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WILCOX & CO

No. 8077

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACKSON FURNITURE COMPANY,
a corporation,

Appellant,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

MESSRS. ROBINSON, PRICE AND MACDONALD,
Attorneys at Law,
Financial Center Building,
Oakland, California,
Attorneys for Plaintiff and Appellant.

H. H. McPIKE, U. S. Attorney,
ESTHER B. PHILLIPS, Assistant U. S. Attorney,
Post Office Building,
San Francisco, California,
Attorneys for Defendant and Appellee.

In the United States District Court in and for the Northern District of California, Southern Division, Second Division.

18413-L.

JACKSON FURNITURE COMPANY,
a corporation,
Plaintiff.

vs.

JOHN P. McLAUGHLIN, Individually and as Collector of Internal Revenue for the First District of California,
Defendant.

COMPLAINT.

Now comes plaintiff above named and complains of defendant above named and for cause of action alleges:

I.

That plaintiff now is and at all times herein mentioned has been a corporation organized and existing under the laws of the State of California, and having its office and principal place of business in the City of Oakland in said state.

II.

That defendant now is and ever since the 20th day of November, 1921 has been the United States Collector of Internal Revenue for the First District of California duly commissioned, qualified and acting pursuant to the laws of the United States and resides and has his office in the City and County of San Francisco in said state; that Justus S. Wardell at all times between the 23rd day of August, 1917 and the 31st day of December, 1920, was the United States Collector of Internal Revenue for the First District of California duly commissioned, qualified and acting pursuant to the laws of the United States; that John L. Flynn at all times between the 1st day of January, 1921 and the 20th day of November, 1921, was the acting United States Collector of Internal Revenue for the First District of California duly commissioned, qualified and acting pursuant to the laws of the United States.

III.

That this action is brought against the defendant as an officer acting under and by authority of the Revenue Acts of 1918, 1921, 1924 and 1928, as will hereinafter more fully appear. [1*]

IV.

That at all of the times hereinafter mentioned plaintiff has been and now is engaged in the business of selling furniture, furnishings and household goods at retail; that during all of said time a large proportion of plaintiff's said business has been the sale of said goods on the installment plan; that when goods are so sold on the installment plan the purchase price is received by plaintiff in regular installments over a period of many months after the date of sale; that for each of the years 1913, 1914, 1915, 1916 and 1917 plaintiff duly and regularly prepared and filed its income tax return under the Revenue Act of the United States then in effect and paid to the United States the income, excess profits tax and war profits tax determined by the Commissioner of Internal Revenue to be due from plaintiff to the United States for each of those years; that in computing its gross income for each of said years plaintiff included in gross income the total amount of the sale price of all installment sales including installments to be received after the termination of the taxable year; that the income,, ex-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

cess profits tax and war profits tax paid by plaintiff to the United States for each of said years was computed by including in gross income the total amount of the sale price of all installment sales including installments to be received after the termination of the taxable year.

That in computing its gross and net income and its income, excess profits and war profits tax in its income tax returns filed with defendant and his predecessors in office for each of the years 1918, 1919, 1920 and 1921, and in making payment of its income and excess profits tax for each of said years, plaintiff adopted the installment sale method of computation authorized by the Commissioner of Internal Revenue and thereby included in the gross income of each of said years only those installments of the purchase price on installment sales made on or after the year 1918 which had been earned in the year for which the return was being prepared.

V.

That on or about the 9th day of June, 1918, plaintiff [2] duly filed with the defendant's predecessor in office, Justus S. Wardell, as United States Collector of Internal Revenue for the First District of California, its income and excess profits tax return for the year 1918 in accordance with the revenue acts of the United States then in effect; that no income or excess profits tax became or was due from plaintiff to the United States for said year 1918; that on or prior to the 14th day of June, 1920,

plaintiff duly filed with the defendant's predecessor in office, Justice S. Wardell, as United States Collector of Internal Revenue for the First District of California, its income and excess profits tax return for the year 1919 in accordance with the revenue acts of the United States then in effect; that plaintiff paid to the United States the sum of Forty-two thousand, four hundred forty-five and 97/100 Dollars ($42,445.97) as and for its income and excess profits tax for the year 1919; that said sum was and is in excess of the entire amount due from plaintiff to the United States for income and excess profits tax for said year 1919; that on or about the 11th day of June, 1921, plaintiff filed with the defendant's predecessor in office, John L. Flynn, Acting United States Collector of Internal Revenue for the First District of California, its income and excess profits tax return for the year 1920 in accordance with the revenue acts of the United States then in effect; that plaintiff paid to the United States the sum of Sixty-five thousand, five hundred seventy-four and 03/100 Dollars ($65,574.03) as and for its income and excess profits tax for the year 1920; that Sixty-three thousand, five hundred seventy-five and 25/100 Dollars ($63,575.25) of said sum was the entire amount due from plaintiff to the United States for income and excess profits tax for said year 1920; that thereafter on or about the 15th day of March, 1922, plaintiff filed with defendant, as Collector as aforesaid, a claim for credit and refund praying that there be refunded to plaintiff

Seven hundred seventy and 79/100 Dollars ($770.79) of said sum of Sixty-five thousand, five hundred seventy-four and 03/100 Dollars ($65,574.03) and that there be [3] credited on account of plaintiff's income and excess profits tax liability for the year 1921 the sum of Nine Thousand, seventy-three and 06/100 Dollars ($9,073.06) thereof; that a copy of said claim for credit and refund is annexed hereto marked "Exhibit A" and by reference made a part hereof; that under said claim for credit plaintiff was entitled to have credited to it on account of its 1921 income and excess profits tax obligation, a credit of One thousand nine hundred ninety-eight and 78/100 Dollars ($1,998.78); that on or before the 15th day of March, 1922, plaintiff duly filed with the defendant, as Collector as aforesaid, its income and excess profits tax return for the year 1921 in accordance with the revenue acts of the United States then in effect; that the sum of Twelve thousand, eight hundred fifty-seven and 99/100 Dollars ($12,857.99) was the entire amount due from plaintiff to the United States for income and excess profits tax for said year 1921; that plaintiff paid to the United States the sum of One Thousand, nine hundred ninety-eight and 78/100 Dollars ($1,998.78) on account of its income and excess profits tax for the year 1921 in the form of a claim for credit by reason of the overpayment in said amount of plaintiff's income and excess profits tax liability for the year 1920; that on or about the 15th day of October, 1927 plaintiff paid to the United States the sum of

Four thousand, one hundred twenty-eight and 49/100 ($4,128.49) Dollars, together with accrued interest thereon on account of its income and excess profits tax for the year 1921, leaving a balance due to the United States of said income and excess profits tax for said year 1921 of Six thousand, seven hundred thirty and 72/100 Dollars ($6,730.72), which said sum, together with accrued interest thereon, was paid by plaintiff to the United States as part of the sum of Nine thousand, seventy-three and 06/100 Dollars ($9,073.06) mentioned in paragraph VI hereof.

That all income tax and excess profits tax due from plaintiff to the United States for the years 1918, 1919, 1920 and 1921, or any thereof, were paid, to the United States, together with accrued interest thereon prior to the 17th day of February, 1928, except said sum of Six thousand, seven hundred and thirty and 72/100 [4] Dollars ($6,730.72) with accrued interest thereon last hereinabove mentioned.

VI.

That on or about the 17th day of February, 1928, plaintiff received from defendant, as Collector of Internal Revenue as aforesaid, a bill and demand for payment of an additional assessment of Forty-six thousand, forty-two and 51/100 Dollars ($46,-042.51) claimed to be due from plaintiff to the United States for additional income and excess profits tax for the year 1918, together with interest thereon in the sum of Nineteen thousand, Seven

hundred ninety-eight and 28/100 Dollars ($19,-798.28), and the sum of Four thousand, five hundred forty-five and 98/100 Dollars ($4,545.98) claimed to be due from plaintiff to the United States for additional income and excess profits tax for the year 1919, together with interest thereon in the sum of One thousand, nine hundred fifty-four and 77/100 Dollars ($1,954.77), and the sum of Two thousand, thirty-four and 38/100 Dollars ($2,034.38) claimed to be due from plaintiff to the United States for additional income and excess profits for the year 1920, together with interest thereon in the sum of Two hundred thirty-four and 62/100 Dollars ($234.62), and the sum of Nine thousand, seventy-three and 06/100 Dollars ($9,073.06) claimed to be due from plaintiff for additional income and excess profits tax for the year 1921 together with interest thereon in the sum of Three thousand, two hundred twenty and 94/100 Dollars ($3,220.94); that on or about the 27th day of February, 1928, plaintiff paid said sums, to-wit, a total sum of Eighty-six thousand, nine hundred four and 54/100 Dollars ($86,904.54) to defendant all under protest on the ground that said additional taxes and interest hereinabove mentioned were and are erroneous and illegal and that said additional assessments were imposed on income alleged to have been received by plaintiff in the years 1918, 1919, 1920 and 1921, which alleged income was already reported and taxes paid thereon by plaintiff in 1917 and/or previous years, and upon the further ground that the

interest alleged to be due on said additional taxes assessed with respect to the period prior to the date of the enactment of the Revenue Act [5] of 1926, to-wit, February 26, 1926 was and is erroneous and illegal in that interest on said additional taxes, if assessable and collectible at all, is assessable and collectible only from the date of the enactment of the Revenue Act of 1926.

VII.

That on or about the 9th day of October, 1928, plaintiff filed with defendant a written claim for the refund of said additional taxes and interest so paid under protest on the ground that said additional taxes and interest were illegally and wrongfully collected for the reasons and upon the grounds set forth in said claim for refund, a copy of which is annexed hereto marked "Exhibit B" and by reference made a part hereof.

VIII.

That seventy-five thousand, seventy-six and 07/100 Dollars ($75,076.07) of said sum of Eighty-six thousand, nine hundred four and 54/100 Dollars ($86,-904.54) additional taxes and interest so paid under protest was and is erroneously assessed and was illegally and wrongfully collected from plaintiff, and was and is illegally and wrongfully retained from plaintiff in this:

Said alleged deficiency for the year 1918 was arrived at by said Commissioner of Internal Revenue by including in gross income for the year 1918

the sum of Two hundred sixty-two thousand, eight hundred eighty-eight and 81/100 Dollars ($262,-888.81) cash collected by the taxpayer in the year 1918 upon installment contracts for the sale of furniture, furnishings and household goods sold by taxpayer to customers in the year 1917 and prior years, which said sum was included in gross income by the taxpayer in its income tax returns for the respective years in which the sales involving the same were made and the full income, excess profits tax and war profits tax thereon paid in said years. By reason of the inclusion of said installment receipts from installment sales made in said prior years in the gross income of taxpayer for the year 1918, the Commissioner of Internal Revenue purported to increase the net income of the taxpayer for the year 1918 by One hundred twenty-two thousand, nine hundred fifty-three and 10/100 [6] Dollars ($122,953.10); that by reason thereof said Commissioner purported to find an alleged deficiency in tax for said year 1918 in the sum of Forty-six thousand, forty-two and 51/100 Dollars ($46,-042.51), together with Nineteen thousand, seven hundred ninety-eight and 28/100 Dollars ($19,-798.28) interest on said sum of Forty-six thousand, forty-two and 51/100 Dollars ($46,042.51) from the date on which said Commissioner alleged said tax to have been due.

Said alleged deficiency for the year 1919 was arrived at by including in gross income for the year 1919 the sum of Thirty-two thousand, three hundred

forty-two and 15/100 Dollars ($32,342.15) cash collected by the taxpayer in the year 1919 upon installment contracts for the sale of furniture, furnishings and household goods sold by taxpayer to customers in the year 1917 and prior years, which said sum was included in gross income by the taxpayer in its income tax returns for the respective years in which the sales involving the same were made and the full income and excess profits tax thereon paid in said years. By reason of the inclusion of said installment receipts from installment sales made in said prior years in the gross income of taxpayer for the year 1919, the Commissioner of Internal Revenue purported to increase the net income of the taxpayer for the year 1919 by Fifteen thousand, one hundred twenty-six and 42/100 Dollars ($15,126.42); that by reason thereof said Commissioner purported to find an alleged deficiency in tax for said year 1919 in the sum of Four thousand, five hundred forty-five and 98/100 Dollars ($4,545.98), together with One thousand, nine hundred fifty-four and 77/100 Dollars ($1,954.77) interest on said sum of Four thousand, five hundred forty-five and 98/100 Dollars ($4,545.98) from the date on which said Commissioner alleged said tax to have been due.

Said alleged deficiency for the year 1920 was arrived at by including in gross income for the year 1920 the sum of Seven thousand, four hundred fifty and 66/100 Dollars ($7,450.66) cash collected by the taxpayer in the year 1920 upon installment contracts for the sale of furniture, furnishings and

household goods [7] sold by taxpayer to customers in the year 1917 and prior years, which said sum was included in gross income by the taxpayer in its income tax returns for the respective years in which the sales involving the same were made and the full income and excess profits tax thereon paid in said years. By reason of the inclusion of said installment receipts from installment sales made in said prior years in the gross income of taxpayer for the year 1920, the Commissioner of Internal Revenue purported to increase the net income of the taxpayer for the year 1920 by Three thousand, four hundred eighty-four and 67/100 Dollars ($3,484.67); that by reason thereof said Commissioner purported to find an alleged deficiency in tax for said year 1920 in the sum of Two thousand thirty-four and 38/100 Dollars ($2,034.38), together with Two hundred thirty-four and 62/100 Dollars ($234.62) interest on said sum of Two Thousand, thirty-four and 38/100 Dollars ($2,034.38) from the date on which said Commissioner alleged said tax to have been due.

Said alleged deficiency for the year 1921 was arrived at by including in gross income for the year 1921 the sum of Six hundred eighty-eight and 96/100 Dollars ($688.96) cash collected by the taxpayer in the year 1921 upon installment contracts for the sale of furniture, furnishings and household goods sold by taxpayer to customers in the year 1917 and prior years, which said sum was included in gross income by the taxpayer in its income tax

returns for the respective years in which the sales involving the same were made and the full income and excess profits tax thereon paid in said years. By reason of the inclusion of said installment receipts from installment sales made in said prior years in the gross income of taxpayer for the year 1921, the Commissioner of Internal Revenue purported to increase the net income of the taxpayer for the year 1921 by Six hundred eighty-eight and 96/100 Dollars ($688.96), [8] together with One hundred twenty-one and 96/100 Dollars ($121.96) interest on said sum of Six hundred eighty-eight and 96/100 Dollars ($688.96) from the date on which said Commissioner alleged said tax to have been due.

That said installment sale receipts which the Commissioner purports to include as gross income of the taxpayer in the years 1918, 1919, 1920 and 1921 were income to the taxpayer for the year 1917 and prior years in which they were returned by the taxpayer as income, and upon which income the taxpayer had theretofore paid the full income tax and excess profits tax thereon, and the inclusion of the same for a second time as gross income in the years 1918, 1919, 1920 and 1921 constitutes double taxation.

The said installment sale receipts were not income to the taxpayer in the years 1918, 1919, 1920 and 1921, having been earned and income and excess profits tax paid thereon prior thereto and having entered into surplus prior to the year 1918.

IX.

That Seventeen thousand, eight hundred fourteen and 60/100 Dollars ($17,814.60) of said sum of Eighty-six thousand, nine hundred four and 54/100 Dollars ($86,904.54) additional taxes and interest so paid under protest was and is erroneously assessed and was illegally and wrongfully collected from plaintiff and was and is illegally and wrongfully retained from plaintiff in this:

Said sum of Seventeen thousand, eight hundred fourteen and 60/100 Dollars ($17,814.60) was assessed against plaintiff and was paid by plaintiff under protest as interest upon said additional assessments for the periods from the respective dates when said additional assessments for the years 1918, 1919, 1920 and 1921 were and are alleged by defendant to have been due from plaintiff to February 26, 1926, which said date was the date of the enactment of the Revenue Act of 1926. That no interest is assess- [9] able or collectible or due from plaintiff upon any of said alleged additional taxes with respect to the period prior to the date of the enactment of the Revenue Act of 1926. That Fifteen thousand, seven hundred sixty-three and 16/100 Dollars ($15,763.16) of said sum of Seventeen thousand, eight hundred fourteen and 60/100 Dollars ($17,-814.60) referred to in this paragraph is included in the sum of Seventy-five thousand, seventy-six and 07/100 ($75,076.07) referred to in paragraph VIII hereof.

X.

That on or about the 4th day of December, 1928, C. B. Allen, United States Deputy Commissioner of Internal Revenue notified plaintiff by written notice that its claim for refund of said additional taxes and interest was disallowed and rejected in its entirety; that said sum of Eighty-six thousand, nine hundred four and 54/100 Dollars ($86,904.54) so paid and collected has not been repaid to plaintiff, nor any part thereof.

XI.

That by reason of the premises, defendant became and is indebted to plaintiff in the sum of Seventy-seven thousand, one hundred twenty-seven and 51/100 Dollars ($77,127.51) together with interest thereon at the rate of six per cent (6%) per annum from February 27, 1928; that said claim of plaintiff is the sole property of plaintiff and has not been sold, transferred or assigned to any person or individual.

WHEREFORE, plaintiff prays judgment against defendant for the sum of Seventy-seven thousand, one hundred twenty-seven and 51/100 Dollars ($77,-127.51) together with interest thereon at the rate of six per cent (6%) per annum from February 27th, 1928, and for plaintiff's costs of suit herein and for such other, further and additional relief as may be meet in the premises.

HARRISON S. ROBINSON,
HARRY L. PRICE,
R. W. MACDONALD,
Attorneys for Plaintiff. [10]

State and Northern District of California,
County of Alameda—ss.

C. F. THOMPSON, being first duly sworn, deposes and says: That he is the Secretary of JACKSON FURNITURE COMPANY, a corporation, the plaintiff in the above entitled action, and as such makes this affidavit for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes it to be true.

C. F. THOMPSON.

Subscribed and sworn to before me this 2nd day of May, 1929.

[Seal] ELLA W. DEMAREST,
Notary Public in and for the County of Alameda, State of California. [11]

EXHIBIT "A"

(Execute Separate Form for Each Tax Period)
Claim for

.....Abatement of Tax Assessed
.....Credit Against Outstanding Assessments
X Refund of Taxes Illegally Collected
.....Refund of Amounts Paid for Stamps Used in Error or Excess

Treasury Department, Internal Revenue Service, Form 843, Jan., 1922. Comptroller General U. S., January 18, 1922.

Important—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of California,
County of Alameda—ss:

Notice to Collector—Collector must indicate in block above the kind of claim, except in Income Tax cases.

Jackson Furniture Company
(Name of taxpayer or purchaser of stamps.)
14th & Clay Streets, Oakland, California
(Business Address)

Period—From January 1, 1920 to December 31, 1920.

This deponent, being duly sworn, according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged. Retail Furniture Dealers.

2. Character of assessment or tax. Income and Excess Profits Tax.

(State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased ..... $

4. Reduction of Tax Liability requested (Income and Profits Tax) ..... $ 9,843.85

5. Amount to be abated ..... $

6. Amount to be refunded (or such greater amount as is legally refundable).....$ 770.79

7. Dates of payment (see Collector's receipts or indorsements of canceled checks).....

(If statement covers income tax liability, items 8-11 inclusive, must be answered.)

8. District in which return (if any) was filed. San Francisco.

9. District in which unpaid assessment appears. San Francisco.

10. Amount of overpayment claimed as credit.....$ 9,073.06

11. Unpaid assessment against which credit is asked; period from January 1, 1921 to December 31, 1921.....$ 9,073.06

Deponent verily believes that this application should be allowed for the following reasons:

Payment of tax made on original return	$65,574.03	
As per amended return	55,730.18	$ 9,843.85

This refund is to correct our income and excess profits tax return for year 1920, on account of an error of $26,759.45 having been made in the furniture inventory as of December 31, 1920, also erroneously charging to surplus during 1921 a bonus paid to our Manager for 1920 services in the amount of $3,697.83, whereas this bonus should have been charged to P. & L. during 1920. Error was due to not clearing the adding machine before listing the

pages of the inventory and was not discovered until December, 1921.

The furniture inventory was originally listed	$159,563.39
Whereas the correct listing should have been	132,803.94
Inventory overstated	26,759.45

[12]

EXHIBIT "B"

(Execute Separate Form for Each Tax Period)

Claim for

.....Abatement of Tax Assessed

.....Credit Against Outstanding Assessments

X Refund of Taxes Illegally Collected

.....Refund of Amounts Paid for Stamps Used in Error or Excess

Treasury Department, Internal Revenue Service, Form 843, Jan., 1922. Comptroller General U. S., January 18, 1922.

Important—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of California,
County of Alameda—ss:

Notice to Collector—Collector must indicate in block above the kind of claim, except in Income Tax cases.

JACKSON FURNITURE COMPANY
(Name of taxpayer or purchaser of stamps)
Fourteenth and Clay Streets, Oakland, California
(Business address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged. Selling Furniture at retail.

2. Character of assessment or tax. Income tax for 1918, 1919, 1920, 1921.

(State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment.....$86,904.54

4. Reduction of Tax Liability requested (Income and Profits Tax).....$86,904.54

5. Amount to be abated.....$

6. Amount to be refunded (or such greater amount as is legally refundable).....$86,904.54

7. Dates of payment (see Collector's receipts or indorsements of canceled checks) February 27, 1928.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed. San Francisco.

9. District in which unpaid assessment appears.....

10. Amount of overpayment claimed as credit .....$.....

11. Unpaid assessment against which credit is asked; period from.....to.....$.....

Deponent verily believes that this application should be allowed for the following reasons:

SEE RIDER ATTACHED HERETO

(Attach additional sheets if necessary.)

Signed: JACKSON FURNITURE COMPANY,
H. K. JACKSON, President.

Sworn to and subscribed before me this 9th day of October, 1928.

[Seal] WM. M. LYONS,
Deputy Collector of Internal Revenue.
(Title)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge. [13]

State of California
County of Alameda.—ss.

H. K. JACKSON, being duly sworn, deposes and says:

The income tax which is hereby requested to be refunded was paid on February 27, 1928 under protest pursuant to deficiency letter of the Commissioner of Internal Revenue dated December 15,

1927 and involves the years 1918, 1919, 1920 and 1921.

1918

$46,042.51 of the amount involved represents alleged deficiency in tax for the year 1918 and $19,798.28 thereof represents interest on said sum of $46,042.51 from the date on which it is alleged to have been due.

Said deficiency for the year 1918 was arrived at by including in gross income for the year 1918 the sum of $262,888.81 cash collected by the taxpayer in the year 1918 upon installment contracts for the sale of furniture sold by taxpayer to customers in the year 1917 and prior years, which said sum was taken into account by taxpayer in its income tax returns for the respective years in which the sales involving the same were made. By reason of the inclusion of said installment receipts from installment sales made in prior years in the gross income of taxpayer for the year 1918, the Commissioner of Internal Revenue purported to increase the net income of the taxpayer for the year 1918 by $122,953.10.

1919

$4,545.98 of the amount involved represents alleged deficiency in tax for the year 1919 and $1,954.77 thereof represents interest on said sum of $4,545.98 from the date on which it is alleged to have been due.

Said deficiency for the year 1919 was arrived at by including in gross income for the year 1919 the

sum of $32,342.15 cash collected by the taxpayer in the year 1919 upon installment contracts for the sale of furniture sold by taxpayer to customers in the year 1917 and prior years, which said sum was taken into account by taxpayer in its income tax returns for the respective years in which the sales involving the same were made. By reason of the inclusion of said installment receipts from installment sales made in prior years in the gross income of taxpayer for the year 1919, the Commissioner of Internal Revenue purported to increase the net income of the taxpayer for the year 1919 by $15,126.42.

1920

$2,034.38 of the amount involved represents alleged deficiency in tax for the year 1920 and $234.62 thereof represents interest on said sum of $2,034.38 from the date on which it is alleged to have been due.

Said deficiency for the year 1920 was arrived at by including in gross income for the year 1920 the sum of $7,450.66 cash collected by the taxpayer in the year 1920 upon installment contracts for the sale of furniture sold by taxpayer to customers in the year 1917 and prior years, which said sum was taken into account by [14] taxpayer in its income tax returns for the respective years in which the sales involving the same were made. By reason of the inclusion of said installment receipts from installment sales made in prior years in the gross income of taxpayer for the year 1920, the Commissioner of Internal Revenue purported to increase

the net income of the taxpayer for the year 1920 by $3,484.67.

1921

$9,073.06 of the amount involved represents alleged deficiency in tax for the year 1921 and $3,220.94 thereof represents interest on said sum of $9,073.06 from the date on which it is alleged to have been due.

Said deficiency for the year 1921 was arrived at in part by including in gross income for the year 1921 the sum of $688.96 cash collected by the taxpayer in the year 1921 upon installment contracts for the sale of furniture sold by taxpayer to customers in the year 1917 and prior years, which said sum was taken into account by taxpayer in its income tax returns for the respective years in which the sales involving the same were made. By reason of the inclusion of said installment receipts from installment sales made in prior years in the gross income of taxpayer for the year 1921, the Commissioner of Internal Revenue purported to increase the net income of the taxpayer for the year 1920 by $688.96.

With respect to each and all of the said proposed deficiencies and the interest thereon taxpayer contends:

I.

The installment sale receipts which the Commissioner purports to include as gross income of the taxpayer in the years 1918, 1919, 1920 and

1921 were income to the taxpayer for the year 1917 and prior years in which they were returned by the taxpayer as income, and upon which income the taxpayer paid the full income tax prior thereto, and the inclusion of the same for a second time as gross income in the years 1918, 1919, 1920 and 1921 constitute double taxation.

II.

Under the XVI Amendment to the Constitution, Congress is authorized to levy a tax upon "income" and may not tax "capital". The items in question were not income to the taxpayer in the years 1918, 1919, 1920 and 1921, having been earned and tax paid thereon prior thereto and having entered into surplus prior to the year 1918. By again taxing the same it is proposed to tax as income that which in fact is not income for the years in question.

III.

If Section 705 (a) of the Revenue Act of 1926 be construed as preventing a refund of the tax, the refund of which is hereby claimed, then said section is unconstitutional in that it sets up as a basis or classification of determining the tax liability of taxpayers an [15] arbitrary or unreasonable basis or standard of liability, to-wit, whether or not a taxpayer had paid his tax at the time of the passage of said Revenue Act of 1926, thereby discriminating against the taxpayer who had paid the disputed item in favor of the taxpayers who still were contesting the same in the Department. Such discrimination is unconstitutional and unlawful.

IV.

If Section 705(a) of the Revenue Act of 1926 be construed as preventing a refund of the tax, the refund of which is hereby claimed, then said section is unconstitutional in that it purports to prevent a taxpayer who has paid his taxes from securing a refund of such overpayment.

V.

That portion of said additional assessment in the form of interest above referred to which is assessed with respect to the period prior to the date of the enactment of the Revenue Act of 1926, to-wit, February 6, 1926, is erroneous and illegal in that interest on said alleged additional taxes, if assessable and collectible at all, is assessable and collectible only from the date of the enactment of the Revenue Act of 1926 under the provisions of Section 283(h) thereof.

VI.

Each and all of the items of gross income which have been charged against the taxpayer in the ascertainment of its net income for the years 1918, 1919, 1920 and 1921, and each thereof were excessive in amount and each and every deduction which was allowed this taxpayer in the ascertainment of such income was insufficient in amount.

VII.

Section 705 of the Revenue Act of 1928 is unconstitutional and is lacking in uniformity and is not drawn in accordance with the requirements of

the XVI Amendment to the Constitution nor with other requirements of the Constitution and is therefore null and void.

VIII.

This claim is filed in accordance with the requirements of the provisions of the Revenue Act of 1928 and with other provisions at law and it is the express purpose of the taxpayer to protect its right in respect of any ground of refund which it may have under the Constitution, the law, the Revenue Act of 1928, or any previous revenue act, or any amendment thereto or any future revenue act, or any present or future decision of the Commissioner of Internal Revenue, the Board of Tax Appeals, or the courts.

This affidavit is made for and on behalf of the taxpayer by H. K. Jackson, its President.

H. K. JACKSON

Subscribed and sworn to before me this 9th day of October, 1928.

WM. M. LYONS

Deputy Collector of Internal Revenue.

[Endorsed]: Filed May 3, 1929. [16]

[Title of Court and Cause.]

ANSWER

NOW COMES defendant above named and answers the complaint of plaintiff herein as follows:

I.

Admits the allegations of Paragraph I, II, III and IV of the complaint.

II.

Answering the allegations of Paragraph V of the complaint, defendant admits that on or about June 9, 1918, plaintiff filed with the defendant's predecessor in office, an income and excess profits tax return for the year 1918. Denies the allegation that no income or excess profits tax became or was due from plaintiff to the United States from said year 1918. Admits that on or prior to June 14, 1920, plaintiff filed with the defendant's predecessor in office, its income and excess profits tax return for the year 1919. Admits that plaintiff paid to the United States the sum of $42,445.97 as and for its income and excess profits tax for the year 1919. Denies that said sum was or is in excess of the entire amount due from plaintiff to the United States for income and excess profits tax for [17] said year 1919. Admits that on or about June 11, 1921, plaintiff filed with the defendant's predecessor in office, its income and excess profits tax return for the year 1920. Admits that plaintiff paid to the United States $65,574.03 as and for its income and excess profits tax for the year 1920. Denies

that the sum of $63,575.25 was the entire amount due from plaintiff to the United States for income and excess profits tax for said year 1920. Admits that thereafter and on or about March 15, 1922, plaintiff filed with defendant as Collector, a claim for credit and refund, praying that there be refunded to plaintiff $770.79 of said sum of $65,574.03, and that there be credited on account of plaintiff's income and excess profits tax liability for the year 1921, the sum of $9,073.06. Admits that copy of said claim for refund and credit is annexed as Exhibit "A" to the complaint herein. Denies that under said claim for credit plaintiff was entitled to have credited to it on account of its 1921 income and excess profits tax, a credit of $1,998.78. Admits that on or before March 15, 1922, plaintiff filed with the defendant as Collector, its income and excess profits tax return for the year 1921. Denies that the sum of $12,857.99 was the entire amount due from plaintiff to the United States for income and excess profits tax for said year 1921. Denies that the plaintiff claimed the right to pay the sum of $1,998.78 on account of its income and excess profits tax for said year 1921 in the form of a claim for credit by reason of an alleged overpayment in said amount of plaintiff's income and excess profits tax liability for the year 1920. Admits that on or about October 15, 1927, plaintiff paid to the United States the sum of $4,128.49, together with accrued interest thereon on account of its income and excess profits

tax [18] for the year 1921. Denies that the balance due to the United States on said income and profits tax for the year 1921 was $6,730.72. Denies that said sum with interest thereon was paid by the plaintiff to the United States as part of the sum of $9,073.06 mentioned in Paragraph VI of the complaint. Denies that all income and excess profits tax due from the plaintiff to the United States for the years 1918, 1919, 1920 and 1921 were paid to the United States, together with interest thereon prior to February 17, 1928.

III.

Admits the allegations of Paragraph VI of the complaint herein.

IV.

Admits the allegations of Paragraph VII of the complaint herein.

V.

Denies each and every allegation in Paragraph VIII of the complaint.

VI.

Denies each and every allegation in Paragraph IX of the complaint.

VII.

Admits the allegations of Paragraph X of the complaint.

VIII.

Denies each and every allegation of Paragraph XI of the complaint.

Wherefore defendant prays that the complaint be dismissed.

GEO. J. HATFIELD
United States Attorney
ESTHER B. PHILLIPS
Assistant United States
Attorney [19]

United States of America,
Northern District of California,
City and County of San Francisco.—ss.

Esther B. Phillips being first duly sworn, deposes and says:

That she is one of the Assistant United States Attorneys for the Northern District of California, one of the attorneys for the defendant in the above entitled action; that the defendant is temporarily absent from San Francisco and is absent from California; that affiant makes this verification in his behalf for said reasons; that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

ESTHER B. PHILLIPS

Subscribed and sworn to before me this 10th day of October, 1929.

[Seal] R. M. GREEN
Deputy

Service of the within answer is admitted this 11th day of Oct. 1929.

HARRISON S. ROBINSON
HARRY L. PRICE
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 14, 1929. [20]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This case came regularly on for trial on March 1, 1934 before the Honorable Harold Louderback, the plaintiff appearing by its attorneys, Messrs. Robinson, Price and Macdonald, and the defendant appearing by his attorneys, H. H. McPike, United States Attorney, and Esther B. Phillips, Assistant United States Attorney, and trial by jury having been expressly waived, evidence oral and documentary having been taken, the cause was submitted upon briefs and having been duly considered by the Court, the Court now makes the following

FINDINGS OF FACT.

I.

On or about June 16, 1919, plaintiff filed its income and profits tax return for the calendar year 1918 and elected therein to report its income on the installment sales basis. Said return reported a loss of $38,249.51, and invested capital of $370,631.46, resulting in no tax liability for 1918. [21]

II.

On or about May 15, 1920, plaintiff filed an amended income and profits tax return for the calendar year 1918, showing an amended net loss of $26,885.31 and an amended invested capital of $375,631.46, resulting in no tax liability for 1918. The net loss of $26,885.31 was computed by plaintiff on the installment basis as follows:

Total Contract Sales	$1,001,602.11
Cost of Goods Sold	505,471.40
Gross profit on contract sales	$ 496,130.71
Percentage of gross profit to gross contract sales 49.53%	
Income from other sources	12,486.68
Total income	$ 508,617.39
Deductions	375,395.62
Net income on accrual basis	$ 133,221.77
Unrealized profit on 1918 installment sales	$ 160,107.08
Net loss reported	$ 26,885.31

III.

Thereafter the Commissioner of Internal Revenue caused to be made an examination and audit of plaintiff's books and records for the calendar years 1916 to 1919, inclusive. Upon the basis of such examination and audit, the said Commissioner determined that plaintiff was not entitled to report its income on the installment sales basis and that plaintiff's tax liability for 1918 should be computed on an accrued net income of $150,603.61 and

invested capital of $357,464.52, resulting in a deficiency in tax of $92,802.50.

Said deficiency of $92,802.50 for 1918, together with a penalty of $4,640.13, aggregating $97,442.63, was assessed against plaintiff on list signed by the Commissioner of Internal Revenue on November 20, 1920.

IV.

Thereafter, on or about March 1, 1921, plaintiff filed with the Collector of Internal Revenue, a claim for abatement covering, among other items, the total amount of the assessment of $97,442.63 for 1918 described in paragraph III hereof. [22]

V.

On or about March 9, 1923, the Collector of Internal Revenue credited as overpayment of 1917 taxes in the sum of $215.22 against the assessment of $97,442.63 for 1918 leaving a balance outstanding on said assessment of $97,227.41.

VI.

On or about November 18, 1926 and September 10, 1927, plaintiff executed and filed with the Collector of Internal Revenue tax collection waivers extending the time within which collection could be made of the balance of $97,227.41 outstanding for 1918 to December 31, 1927 and December 31, 1928, respectively. Said waivers were duly accepted in writing by the said Collector on behalf of the Commissioner of Internal Revenue.

VII.

During the year 1927, the Commissioner of Internal Revenue caused to be made a reexamination and reaudit of plaintiff's books and records for the calendar years 1918 to 1920, inclusive. Upon the basis of such reexamination and reaudit, the said Commissioner determined that plaintiff was entitled to report its taxable net income for 1918 on the installment sales basis and that plaintiff's correct tax liability should be computed as follows:

Net loss reported on amended return	$ 26,885.31	
Increase in net loss not in dispute here	1,826.04	
Net loss not in dispute here	$ 28,711.35	
Increase in income representing 46.77% of $262,888.81 collected in 1918 on installments sales made in 1917 and prior years, and which adjustment is in controversy in this suit	$122,953.10	
Net income as determined by the Commissioner of Internal Revenue	$ 94,241.75	
Invested capital reported on amended returns	$375,631.46	
Decrease of invested capital reported due to various adjustments not here disputed	16,709.63	

[23]

Invested capital as determined by the Commissioner of Internal Revenue and not challenged here	$358,921.83	
	Tax	Penalty
Profits tax	$ 39,987.18	
Income tax	6,270.55	
Total tax	$ 46,257.73	
Previously assessed	92,802.50	$4,640.13

VIII.

The overassessment for 1918 of $46,544.77 tax and $4,640.13, penalty, aggregating $51,184.90, was applied by the Commissioner of Internal Revenue as an allowance in part of plaintiff's claim for abatement described in paragraph IV hereof to the extent of $51,184.90. Said overassessment was allowed on a schedule signed by the Commissioner on February 9, 1928.

IX.

Thereupon the Collector of Internal Revenue abated the assessment outstanding against plaintiff for 1918 to the extent of $51,184.90, leaving a balance of $46,042.51 outstanding on his accounts. After notice and demand by the said Collector plaintiff on or about February 28, 1928 paid $65,840.79, representing said balance of $46,042.51 together with interest of $19,798.28, computed upon the rejected portion of plaintiff's claim for the abatement of $97,442.63.

X.

On or about October 17, 1928, plaintiff filed a claim for refund of $86,904.54, which claim covered among other items the payment of $65,840.79 described in paragraph IX hereof.

Said claim sought recovery of the total amount of tax and interest paid for the calendar year 1918 on the ground among others, that the increase of its income in the amount of $122,953.10 because of collections made in 1918 on installment sales made in

1917 and prior years was illegal. Said item represents the total tax and interest of $65,840.79 paid.

Said claim was rejected by the Commissioner of Internal Revenue on a schedule signed November 23, 1928. [24]

XI.

On or about May 15, 1920, plaintiff filed its income and profits tax return for the calendar year 1919. Said return reported a net income of $130,686.70 and invested capital of $335,925.31, resulting in a total tax liability of $42,445.97. The total tax liability of $42,445.97 so reported was paid by plaintiff as follows:

March 15, 1920	$ 6,500.00
June 12, 1920	945.97
September 13, 1920	10,000.00
December 14, 1920	10,000.00
July 13, 1923—Cash paid 3/14/19 with tentative return for 1918	15,000.00
Total	$42,445.97

XII.

The net income of $130,686.70 reported in the return described above was computed by plaintiff as follows:

Total contract sales		$1,375,599.54
Cost of goods sold		715,100.09
Gross profit on contract sales		$ 660,499.45
Percentage of gross profit to gross contract sales	48.01%	
Income from other sources		21,137.01
Total income		$ 681,636.46
Total deductions		470,117.68
Net income on accrual basis		$ 211,518.78
Unrealized profits on 1919 sales less profits realized on 1918 sales collected in 1919		80,832.08
Net income reported		$ 130,686.70

XIII.

Thereafter the Commissioner of Internal Revenue caused to be made an examination and audit of plaintiff's books and records for the calendar years 1916 to 1919, inclusive. Upon the basis of such examination and audit, the said Commissioner determined that plaintiff was not entitled to report its income on the installment sales basis and that plaintiff's tax liability for 1919 should be computed on an accrued net income of $215,874.40 and invested capital of $456,107.71 resulting in a deficiency in tax of $33,128.42.

Said deficiency of $33,128.42 for 1919, together with a penalty of $1,656.42, aggregating $34,784.84, was assessed against plaintiff on list signed by the Commissioner of Internal [25] Revenue on November 20, 1920.

XIV.

Thereafter, on or about March 1, 1921, plaintiff filed with the Collector of Internal Revenue, a claim for abatement covering, among other items, the total amount of the assessment of $34,784.84 for 1919 described in paragraph XIII hereof.

XV.

On or about November 18, 1926 and September 10, 1927, plaintiff executed and filed with the Collector of Internal Revenue tax collection waivers extending the time within which collection could be made of the balance of $34,784.84 outstanding for 1919 to December 31, 1927 and December 31, 1928, respectively. Said waivers were duly accepted in writing by the said Collector on behalf of the Commissioner of Internal Revenue.

XVI.

During the year 1927, the Commissioner of Internal Revenue caused to be made a reexamination and reaudit of plaintiff's books and records for the calendar years 1918 to 1920, inclusive. Upon the basis of such reexamination and reaudit, the said Commissioner determined that plaintiff was entitled to report its taxable net income for 1919 on the installment sales basis and that plaintiff's correct tax liability should be computed as follows:

Net Income reported	$130,686.70
Decrease in income because of various adjustments and corrections not in dispute here	7,081.66
Net income admitted by plaintiff	$123,605.04
Increase in income representing 46.77% of $32,342.15 collected in 1919 on installment sales made in 1917 and prior years, and which adjustment is in controversy in this suit	15,126.42
Net income as determined by the Commissioner of Internal Revenue	$138,731.46
Invested capital reported	$335,925.31
Increase in invested capital because of various adjustments and corrections not in dispute here	2,760.68
Invested capital admitted by plaintiff	$338,685.99
Brought forward:	$338,685.99
Decrease in invested capital representing proration of 1918 tax of $46,257.73 as determined by the Commissioner of Internal Revenue and which decrease is in dispute in this suit	19,548.25
Invested capital as determined by the Commissioner of Internal Revenue	$319,137.47
Profits tax	37,020.89
Income tax	9,971.06
Total tax	$ 46,991.95

[26]

	Tax	Penalty
Tax previously assessed:		
Original assessment	$ 42,445.97	
Additional assessment	33,128.42	$1,656.42
Total	$ 75,574.39	$1,656.42
Tax liability	46,991.95	
Overassessment	$ 28,582.44	$1,656.42

XVII.

The overassessment for 1919 of $28,582.44 tax and $1,656.42 penalty, aggregating $30,238.86 was applied by the Commissioner of Internal Revenue as an allowance in part of plaintiff's claim for abatement described in paragraph XIV hereof to the extent of $30,238.86. Said overassessment was allowed on a schedule signed by the Commissioner on February 9, 1928.

XVIII.

Thereupon the Collector of Internal Revenue abated the assessment outstanding against plaintiff for 1919 to the extent of $30,238.86, leaving a balance of $4,545.98 outstanding on his accounts. After notice and demand by the said Collector, plaintiff on or about February 28, 1928, paid $6,500.75 representing said balance of $4,545.98 together with interest of $1,954.77 computed upon the rejected portion of plaintiff's claim for the abatement of $34,784.84.

XIX.

On or about October 17, 1928, plaintiff filed a claim for refund of $86,904.54, which claim covered among other items, the payment of $6,500.75 described in paragraph XVIII hereof. Said claim sought recovery of the total amount of the [27] additional tax of $4,545.98 and interest thereon of $1,954.77, aggregating $6,500.75, thus paid for the calendar year 1919, on the ground among others, that the increase of its income in the amount of

$15,126.42 because of collections made in 1919 on installment sales made in 1917 and prior years was illegal. Said item of increase in 1919 income with the reduction in 1919 invested capital of $19,548.52, which the Commissioner made as the result of additional tax liability determined for the year 1918 (Paragraph XVI hereinbefore) constitute together the sole basis for the additional 1919 tax and interest of $6,500.75 so paid and now in question. Said claim was rejected by the Commissioner of Internal Revenue on a schedule signed by him on November 23, 1928.

XX.

On or about March 15, 1921, plaintiff filed its original income and profits tax return for the calendar year 1920. Said return reported a net income of $181,404.91 and invested capital of $429,745.83, resulting in a total tax liability of $61,047.07. The total tax liability of $61,047.07 so reported was paid by plaintiff as follows:

March 15, 1921	$15,261.79
June 13, 1921	17,525.23
September 13, 1921	16,393.51
December 15, 1921	11,866.54
Total	$61,047.07

XXI.

On or about June 13, 1921, plaintiff filed its first amended income and profits tax return for the calendar year 1920 amending the income of $181,404.91,

originally reported to $191,246.14, and indicating a total tax liability for 1920 of $65,574.03 or an additional tax of $4,526.96 over and above the sum of $61,047.07 theretofore reported and paid as described in paragraph XX hereof. Said additional tax of $4,526.96 so reported was paid by plaintiff on December 15, 1921. [28]

XXII.

Thereafter, on or about March 11, 1922, plaintiff filed its second and final amended income and profits tax return for the calendar year 1920, amended net income as theretofore reported to $169,846.46 and indicating a total tax liability of $55,750.18 or an overpayment of taxes for 1920 in the sum of $9,843.85.

XXIII.

The net income of $169,846.46 reported in the return described above was computed by plaintiff as follows:

Gross sales	$1,693,033.25
Cost of goods sold	918,622.35
Gross profit on accrual basis	$ 774,410.90
Income from rentals	750.00
Income from other sources	38,517.23
Total gross income on accrual basis	$ 813,678.13
Deductions, including loss on sale of capital assets	592,905.05
Net income on accrual basis	$ 220,773.08

Profit realized through 1920 collections on 1918 and 1919 sales reported on installment basis:		
1918 ($25,491.80 at 49.53%)—	$12,626.09	
1919 ($413,249.10 at 48.01%)—	$198,400.89	$ 211,026.98
		$ 431,800.06
Unrealized profit on 1920 sales		261,953.60
Net income reported		$ 169,846.46

XXIV.

On or about March 11, 1922, plaintiff filed a claim for credit and refund of $9,843.85, alleged overpayment of 1920 income and profits taxes as shown by the amended return described in paragraph XXII hereof. Said claim asked the credit of $9,073.06 against plaintiff's reported tax liability for 1921 and also asked the refund of the balance of the alleged overpayment, or $770.79. The Commissioner of Internal Revenue conceded the correctness of plaintiff's contention in this claim but made other adjustments and corrections to plaintiff's return which more than offset the conceded contentions. As more fully explained hereafter, plaintiff concedes the correctness of the [29] Commissioner's adjustments only to the extent that such adjustments offset $7,005.31 of the amount of tax claimed as a credit, leaving the sum of $2,067.75, together with interest thereon of $734.05, aggregating $2,801.80, which was paid upon the rejection of such claim for credit as one of the

two 1920 tax items in dispute in this suit. (See Paragraph XXX hereinafter).

Said claim was rejected by the Commissioner of Internal Revenue on a schedule signed on February 18, 1928.

XXV.

On or about December 14, 1925, November 2, 1926 and November 16, 1927, plaintiff executed and filed with the Commissioner of Internal Revenue income and profits tax waivers extending the time within which assessments against plaintiff for the year 1920 could be made to December 31, 1926, December 31, 1927 and December 31, 1928, respectively. Said waivers were duly accepted in writing by the Commissioner of Internal Revenue.

XXVI.

During the year 1927, the Commissioner of Internal Revenue caused to be made an examination and audit of plaintiff's books and records for the calendar year 1920. Upon the basis of such examination and audit, said Commissioner determined that plaintiff's correct tax liability for 1920 should be computed as follows:

Net income reported on final amended return		$169,846.46
Increase in income because of various adjustments and corrections not in dispute here		16,591.37
Net income admitted by plaintiff		$186,437.83
Increase in income representing 46.77% of $7,450.66, collected in 1920 on installment sales made in 1917 and prior years, and which adjustment is in controversy in this suit		3,484.67
Net income as determined by the Commissioner of Internal Revenue		$189,922.50
Invested capital reported on amended return		$429,745.83
Decrease in invested capital because of various adjustments and corrections not in dispute here		4,320.98
		$425,424.85

[30]

Brought forward:		$425,424.85
Decrease in invested capital representing items in dispute in this suit as follows:		
1918 tax as determined by the Commissioner	$ 46,257.73	
1919 tax of $46,991.95 as determined by the Commissioner prorated $19,804.76 less amount reported $17,937.77	1,866.99	
Total items in dispute		48,124.72

Invested capital as determined by the Commissioner of Internal Revenue		$377,300.13
Profits tax		54,240.18
Income tax		13,368.23
Total tax		$ 67,608.41
Previously assessed:		
Original	$61,047.07	
Amended return	4,526.96	$ 65,574.03
Deficiency in tax		$ 2,034.38

XXVII.

On December 15, 1927, statutory notice of deficiency covering the calendar year 1920 was mailed to plaintiff. Said notice informed plaintiff of its right to petition the United States Board of Tax Appeals for a redetermination of the deficiency. It also contained various schedules showing in detail, among other things, the manner in which the deficiency was computed by the Commissioner of Internal Revenue.

XXVIII.

On or about January 12, 1928, plaintiff executed and filed with the Commissioner of Internal Revenue, a waiver of its right to file a petition with the United States Board of Tax Appeals and consent to the assessment and collection of the deficiency of $2,034.38 for the year 1920.

XXIX.

Thereupon, said deficiency of $2,034.38 for 1920, together with interest in the sum of $234.62, aggregating $2,269.00 was assessed on list signed by the

Commissioner of Internal Revenue on January 28, 1928 and paid by plaintiff on February 28, 1928. [31]

XXX.

On or about October 17, 1928, plaintiff filed a claim for refund of $86,904.54, which claim covered, among other items, the payment of $2,269.00 for 1920, described in paragraph XXIX hereof.

Said claim sought recovery of the total amount of $2,269.00 so paid for the calendar year 1920 on the ground among others that the increase of its income in the amount of $3,484.67 because of collections made in 1920 on installment sales made in 1917 and prior years was illegal. Said item of increase of $3,484.67 in 1920 income taken in connection with the reduction in 1920 invested capital by $48,124.72 which the Commissioner made as the result of additional tax liability determined for 1918 and 1919 (Paragraph XXVI hereinbefore), together constitute the basis for the 1920 tax and interest of $5,070.80 that is in question in this suit. Said sum covers the additional assessment of tax and interest aggregating $2,269.00 described in Paragraph XXIX hereinbefore and the portion of original assessment of tax and interest aggregating $2,801.80 which was paid upon rejection of the claim for credit described in Paragraph XXIV hereinbefore. Said claim for refund was rejected by the Commissioner of Internal Revenue on a schedule signed by him on November 23, 1928.

XXXI.

On or about March 11, 1922, plaintiff filed its income and profits tax return for the calendar year 1921. Said return reported a net income of $62,-154.71 and invested capital of $540,990.26, resulting in a total tax liability of $9,073.06. On the same date, March 11, 1922, plaintiff filed a claim for credit and refund of $9,843.85 alleged overpayment of 1920 income and profits taxes asking that $9,073.06 of such alleged overpayment be applied as a credit against the above described tax liability for 1921. See paragraph XXIV hereof. [32]

XXXII.

The net income of $62,154.71 reported in the return described above was computed by plaintiff as follows:

Gross sales	$1,673,023.71
Cost of Goods sold	993,727.68
Gross profit on accrual basis	$ 679,296.03
Percentage of gross profits to gross sales 40.59%	
Income from other sources	28,986.22
Profit on sale of capital assets	112.83
	$ 708,395.08
Deductions	609,047.97
Net income on accrual basis	$ 99,437.11
Profit realized through 1921 collections on prior years' sales reported on installment sales basis	224,922.59
	$ 324,269.70
Unrealized profits on 1921 installment sales	262,114.99
Net income reported	$ 62,154.71

XXXIII.

On or about December 14, 1925 and November 2, 1926, plaintiff executed and filed with the Commissioner of Internal Revenue income and profits tax waivers extending the time within which assessments against plaintiff for the year 1921 could be made to December 31, 1926 and December 31, 1927, respectively. Said waivers were duly accepted in writing by the Commissioner of Internal Revenue.

XXXIV.

On or about August 3, 1927, plaintiff executed and filed with the Collector of Internal Revenue a tax collection waiver extending the time within which collection could be made of the assessment of $9,073.06 outstanding for 1921 to December 31, 1928. Said waiver was duly accepted in writing by the said Collector on behalf of the Commissioner of Internal Revenue.

XXXV.

During the year 1927, the Commissioner of Internal Revenue caused to be made an examination and audit of Plaintiff's books and records for the calendar year 1921. Upon the basis of such examination and audit said Commissioner determined that plaintiff's correct tax liability for 1921 should be computed as follows: [33]

Net income as reported	$ 62,154.71
Net increase of income reported due to various adjustments not here involved	14,789.71
Net income admitted by plaintiff	$ 76,944.42
Further increase representing 46.77% of $1,451.70 collected in 1921 on installment sales made in 1917 and prior years, and which item is in controversy in this suit	688.96
Net income as determined by the Commissioner of Internal Revenue	$ 77,633.38
Invested capital as reported	$540,990.26
Increase of invested capital reported due to various adjustments not here disputed	14,273.16
Corrected invested capital as determined by the Commissioner of Internal Revenue and not challenged in this suit	$555,263.42
Excess profits Tax	6,042.46
Income Tax	7,159.09
Total Tax	$ 13,201.55
Tax previously assessed	9,073.06
Deficiency in tax	$ 4,128.49

XXXVI.

On June 23, 1927, statutory notice of deficiency in tax for the calendar year 1921 was mailed to plaintiff. Said notice informed plaintiff of its right to petition the United States Board of Tax Appeals for a redetermination of the deficiency. It also contained various schedules showing in detail the manner in which the deficiency was computed by the Commissioner of Internal Revenue.

XXXVII.

Plaintiff filed no appeal within the time allowed by law, whereupon, said deficiency of $4,128.49, together with interest in the sum of $1,261.76, aggregating $5,390.25, was assessed on list signed by the Commissioner of Internal Revenue on September 3, 1927 and paid by plaintiff on October 18, 1927.

XXXVIII.

Plaintiff's claim for credit and refund of $9,843.85 alleged overpayment of 1920 income and profits taxes asking that $9,073.06 of such alleged overpayment be applied as a credit against the outstanding original tax for 1921 was rejected by the [34] Commissioner of Internal Revenue on a schedule signed by him on February 18, 1928. See paragraph XXIV and XXXI hereof. Thereupon, on March 28, 1928, plaintiff paid said outstanding original tax for 1921 of $9,073.06, together with interest thereon in the sum of $3,220.94, aggregating $12,294.00.

XXXIX.

On or about October 17, 1928, plaintiff filed a claim for refund of $86,904.54, which claim covered, among other items, the payment of $12,294.00 described in paragraph XXXVIII hereof. Said claim sought recovery of a portion of the tax paid for 1921 on the ground among others that the increase of its income in the amount of $688.96 because of collections made in 1921 on installment sales made in 1917 and prior years is illegal. Said item of $688.96 represents a tax of $192.90 and interest

thereon of $58.96, aggregating $251.86, which tax and interest were assessed and paid as a part of the item of $5,390.25, described in paragraph XXXVII hereof. Said claim was rejected by the Commissioner of Internal Revenue on a schedule signed by him on November 23, 1928.

XL.

It is also found that $14,273.18 of said sum of $19,798.28 assessed against the taxpayer as interest upon said alleged deficiency for the year 1918 was assessed against the taxpayer and was paid by taxpayer under protest as interest upon said alleged deficiency for the period from December 31, 1920 to February 26, 1926, which said date was the date of the enactment of the Revenue Act of 1926; that $1,409.25 of said sum of $1,954.77 assessed against the taxpayer as interest upon said alleged deficiency for the year 1919 was assessed against the taxpayer and was paid by taxpayer under protest as interest upon said alleged deficiency for the period from December 31, 1920 to February 26, 1926 which said date was the date of the enactment of the Revenue Act of 1926; that $2,132.17 of said sum of $3,220.94 assessed against the taxpayer as interest upon said alleged deficiency for the year 1921 was assessed against the taxpayer [35] and was paid by taxpayer under protest as interest upon said alleged deficiency for the period from April 1, 1922 to February 26, 1926, which said date was the date of the enactment of the Revenue Act of 1926.

XLI.

A first notice and demand for payment of the deficiency assessment of November, 1920 was made on December 1, 1920 by the defendant, Collector of Internal Revenue. A second notice and demand of the deficiency assessment made in November, 1920 was made on December 31, 1920 by the defendant, Collector of Internal Revenue.

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW.

I.

That the plaintiff is not entitled to recovery of any of the principal or interest demanded by its complaint.

II.

That the defendant is entitled to a judgment in his favor, with costs.

Let judgment be entered accordingly.

HAROLD LOUDERBACK
United States District Judge.

Dated: San Francisco, California.

[Endorsed]: Filed Sep. 7, 1935. [36]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18413-L

JACKSON FURNITURE COMPANY,
a corporation,

Plaintiff,

-vs-

JOHN P. McLAUGHLIN, Collector of Internal Revenue,

Defendant.

JUDGMENT ON FINDINGS

This cause having come on regularly for trial on the 1st day of March, 1934, before the Court sitting without a Jury, a Jury having been waived by oral stipulation; Harry L. Price and Harrison S. Robinson, Esquires, appearing as attorneys for plaintiff, and Esther B. Phillips, Assistant U. S. Attorney, appearing as attorney for defendant, and the trial having been proceeded with and an Agreed Statement of Facts having been filed, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the court after due deliberation having rendered its decision and filed its findings, and ordered that Judgment be entered in favor of defendant and for costs in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendant go hereof without day, and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at $27.00.

Judgment entered this 7th day of September, 1935.

WALTER B. MALING,
Clerk. [37]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

BE IT REMEMBERED; That the above entitled cause came on regularly for trial on the 1st day of March, 1934, upon issue made by the complaint of plaintiff and the answer of defendant before the above entitled Court, Honorable Harold Louderback sitting, Messrs. Harry L. Price and Robert W. Macdonald appearing as attorneys for plaintiff and Esther B. Phillips, Assistant United States Attorney, appearing as attorney for defendant.

In the course of the trial counsel for plaintiff did take and allege sundry exceptions to the rulings of the Court, which said exceptions are hereinafter set forth.

A jury trial was duly waived by written stipulation signed by all parties.

Thereupon the following proceedings were had and evidence introduced and the same constitutes

all the testimony and evidence introduced at said trial.

Plaintiff, to sustain the issues upon its part, offered the following testimony and documentary evidence:

Counsel for plaintiff offered and the Court received in evidence and there was deemed read into evidence an Agreed Statement of Facts signed by counsel for the respective parties in words and figures as follows, to-wit: [38]

An "Agreed Statement of Facts" was here introduced by which the parties agreed to the facts stated in paragraphs I to XL inclusive of the "Findings of Fact". [Printers Note: Set forth in printed Transcript of Record at pp. 32-53.] [39]

Thereupon plaintiff rested.

Counsel for defendant thereupon introduced the following evidence:

TESTIMONY OF JOSEPH W. REICHLIN, For Defendant.

Joseph W. Reichlin, a witness called and sworn on behalf of defendant, testified as follows:

Direct Examination

(By Miss PHILLIPS) I am in charge of the Income Tax Division of the Collector of Internal Revenue, First District of California; my office is in San Francisco. I have been in the office of the Collector of Internal Revenue since September, 1907, but in this position which I now hold since

(Testimony of Joseph W. Reichlin.)

February 1, 1918. My duty is as soon as I get the assessment list to make up notices and demands for all amounts which are due to the Government on income tax. I brought with me the original assessment of tax against the plaintiff in this case, Jackson Furniture Company. I have it here.

The date of the assessment roll which I have in my hand and the date when the Commissioner signed it was November 9, 1920. The date of the receipt of it in my office is journalized as 11/30/20.

Mr. MACDONALD: One moment: it appears that the witness is testifying from a document which has not been sought to be introduced in evidence, and we accordingly believe the testimony is immaterial, irrelevant and incompetent; in other words, I do not think the proper foundation has been laid.

Miss PHILLIPS: I will withdraw the question if counsel has any objection to it, as it was purely preliminary.

The WITNESS: (continuing) I sent out notice of demand for the collection of the taxes assessed on the assessment roll which I have in my hand. [40]

Mr. MACDONALD: I would like to have an opportunity before the witness testifies as to sending notices out which occurred about fourteen years ago to know whether or not the witness is testifying from his own memory or is testifying from the documents which he holds in his hand.

The COURT: Let us establish that foundation and see what is the basis of his knowledge.

(Testimony of Joseph W. Reichlin.)

Miss PHILLIPS: Mr. Reichlin, will you state whether or not you made any memorandum showing whether or not you made any notice or demand for taxes? I will withdraw that question. You have in your hand a document headed "Assessment certificate District First California, Month of November, Year 1920, Additional Assessment, Income Tax Division," showing the name W. M. Williams, Commissioner of Internal Revenue. Where did you get this record?

A. This record came from the Income Tax Division of the Office of the Collector of Internal Revenue in San Francisco. It is an original.

Miss PHILLIPS: I am going to offer this in evidence as Exhibit 1.

Mr. MACDONALD: If your Honor please, we object to the introduction of that in evidence on the ground that it is immaterial, irrelevant, and incompetent, the proper foundation has not been laid, and further that the fact that the assessment list was made out is conceded in the agreed statement of facts and if this is sought to be introduced it is for some other and, we believe, improper purpose.

Miss PHILLIPS: I must confess that I do not understand counsel. First, he objects because I questioned this witness, not having introduced it in evidence, and now he says my offering it in evidence is not necessary because it is stipu- [41] lated to. I wish he would take a position one way or the other.

(Testimony of Joseph W. Reichlin.)

Mr. MACDONALD: We take the position that the statement of facts does in so many words state that an assessment list was prepared by the Commissioner of Internal Revenue, and that is stipulated to in the agreed statement of facts, and what is sought otherwise to be proved here, as, for instance, the sending of a notice from such a record we believe is improper.

Miss PHILLIPS: I have been trying to overcome plaintiff's objections. First he says that I cannot question the witness about sending out notices and demands for taxes shown on that assessment roll because I have not offered it in evidence. Now I offer it in evidence and direct the attention of the Court to the name Jackson Furniture Company appearing in the first two names of that list, preparatory to asking the witness whether he sent notices and demand for the assessment shown in that roll to that person, and if so how he knows he sent it. Now, I do not understand counsel's objection as to why I cannot offer this in evidence for the purpose as stated.

The COURT: Let me ask you: Have you any recollection of the sending out of a notice in this case? A. Yes.

Q. You have a definite independent recollection? A. Yes.

Q. Irrespective of any record you recall sending it out? A. Yes.

(Testimony of Joseph W. Reichlin.)

Q. Do you know the date that it was sent out?

A. Yes.

Q. You have in your own mind the date that it was sent out? A. Yes.

Q. Do you remember that without refreshing your memory by looking at that record?

A. I know this because of its being rather a big assessment, the little ones I would not recall, the larger ones I can remember.

Q. You have personal knowledge of it?

A. I cannot say the exact date without first referring to the date or month, but about the latter part of 1920, it is in my memory, without look- [42] ing at any books.

Q. When you send these notices out do you make a record of the date?

A. Yes, I make a record of the date when they go out.

Q. And you make it at the same time that you send it out?

A. The day the notice goes out.

Q. In this case, do you know whether you made a record at the same time? A. I know I did.

Q. Is that record in your handwriting that has been introduced here? A. Yes.

Q. And as you view it, it would refresh your memory as to the date? A. Yes.

Mr. MACDONALD: That is not the document that is sought to be introduced in evidence. Is that memorandum made in your own handwriting as to

(Testimony of Joseph W. Reichlin.)
the sending out of these notices contained in this assessment roll which is here?

A. It is right on the first page, here.

Miss PHILLIPS: Counsel is not letting me ask questions.

The COURT: Let us proceed.

Miss PHILLIPS: Q. What sort of a record do you make, show me on this what is the record that you refer to of the date that it was sent out?

A. That is the record, right here.

Q. Show it to the Court and show it to counsel.

The COURT: You remember that is the date upon which you sent it. A. Yes.

Q. What is the date?

A. That was on 12/11/20.

Q. What does that mean?

A. That means December 11, 1920.

The WITNESS: (continuing) The numeral "17" on the record means the first notice of demand sent out for any tax that is assessed. I have not any of Form 17 with me nor does the Office of the Collector of Internal Revenue have copies of [43] Form 17. That form is obsolete now. I gave the United States Attorney the last Form 17 about six months ago for use in the Crown Willamette case.

Q. Mr. Reichlin, do the office records of the Collector show whether the Jackson Furniture Company filed a claim in abatement of that tax?

Mr. MACDONALD: One moment, I object to the witness testifying as to what the office records show. The office records are the best evidence.

(Testimony of Joseph W. Reichlin.)

Miss PHILLIPS: Q. Will you examine this original record from the office as to the Jackson Furniture Company? Is there any notation on that record showing whether the Jackson Furniture Company ever filed a claim in abatement?

A. Yes. On February 28th.

The COURT: You find a notation covering that subject? A. Yes.

Mr. MACDONALD: It is in the agreed statement of facts that we did file a claim in abatement, if your Honor please.

Miss PHILLIPS: Very well. Counsel has been objecting and I wished to show that they filed a claim in abatement, showing that they had notice of the tax.

The COURT: If that is in the agreed statement of facts there is no use of covering that.

Cross Examination

(By Mr. MACDONALD) In 1933 I sent out a little over 100,000 notices of demand to taxpayers to pay taxes. In 1932 I sent out approximately 37,000. In the year 1926 I sent out a notice and demand to Jackson Furniture Company. There are so many of them that I cannot name any other taxpayer to whom I sent a notice and demand in 1926. Certain cases I can remember. Whenever any case [44] is a big case it is impressed on my mind.

About six months ago when Mr. Price visited my office and asked me when a notice and demand,

(Testimony of Joseph W. Reichlin.)

if any, was sent to the Jackson Furniture Company with regard to the 1918 and 1919 assessment, I told him that I could not tell it without referring to my records. I could not say the date. We would not need books if we had that good a memory.

I would have to look at my books to find out the date. That is what we have the books for.

Mr. MACDONALD: Mr. Reichlin, there is in pencil as I read it on this the following figures: '17/12/11/20' and then there is some other pencil memoranda. Will you kindly state whether that other pencil memoranda is in your handwriting?

A. The other pencil handwriting is not in my writing, but I can explain it.

Q. Can you state positively today when you made the notation "12/11/20"?

A. Yes, December 11, 1920.

Q. You can remember that independently, that you made that on December 11, 1920, that you made this notation? A. Yes.

I made the notation 12/11/20 on December 11, 1920. I remember that fact independently.

In my particular office I have two, three, sometimes six employees. These notices and demands in 1920 were made out by Elizabeth Giddings. She types them. I proofread every one and check every one myself personally. I did not take each one of them last year and put them in the mail box, but I have ever since February of 1918 put them in an envelope, each and every one, and took them and

(Testimony of Joseph W. Reichlin.)

put them in the mail box. At this particular time there were about six hundred notices and demands.

Mr. MACDONALD: Q. And you can remember independently that you put the one of the Jackson Furniture Company in the [45] mail when in that year there were about 600?

A. I checked every one carefully as to the amount and name, yes.

Form 117-A revised June, 1923 is practically the same as Form 17, very little change.

Re-direct Examination

Q. Is there any difference between this form and Form 17?

Mr. MACDONALD: I object to that as calling for the opinion of the witness and not the best evidence.

The COURT: I will overrule the objection.

To which ruling of the Court counsel for plaintiff excepted and said exception is here designated:

EXCEPTION NUMBER 1

A. No difference.

Miss PHILLIPS: Q. You have referred in your previous testimony to a form known as Form 17. I have here an exhibit taken from the case of the Crown Willamette Paper Co. v. McLaughlin, Exhibits Nos. 20 and 21 in that case, and I will show you these two exhibits. Are either of these Form 17 to which you have referred, or a duplicate of Form 17 to which you have referred?

A. That is a copy of Form 17.

(Testimony of Joseph W. Reichlin.)

Mr. MACDONALD: This shows on its face the witness is mistaken. This is marked Form 117-A, Revised June 17, 1923.

The WITNESS: (continuing) This is practically the same as Form 17, very little change. There is no difference. I have no copy of Form 17 because we have none in our Office. They are obsolete. I have looked high and low for them. We could try outside my office, write Washington to see if they have a copy, but I have not done it. I could not say whether or not there is any copy of that form in existence. There is [46] none in our office.

TESTIMONY OF CHARLES F. THOMPSON, For Defendant.

Charles F. Thompson, a witness called and sworn on behalf of defendant, testified as follows:

Direct Examination

(By Miss PHILLIPS) I am a Certified Public Accountant. In the year 1920 and 1921 I was Secretary of Jackson Furniture Company. I know Mr. Jackson, the President of the Company.

Q. I show you a paper certified to be a true copy of a claim in abatement.

Mr. MACDONALD: I will stipulate that is signed by Mr. H. K. Jackson, the President of the Company.

Miss PHILLIPS: That is all. [47]

Thereupon the defendant rested.

TESTIMONY OF CHARLES F. THOMPSON, For Plaintiff in Rebuttal.

Charles F. Thompson, a witness heretofore sworn, called on behalf of plaintiff in rebuttal, testified as follows:

Direct Examination.

(By Mr. MACDONALD) I went to work for Jackson Furniture Company on February 7, 1907. During the period from 1920 up to and through the year 1928 I held the position of Secretary of Jackson Furniture Company. I had the superintendency of the accounts of the books and the preparation of our income tax return.

I recall a visit to the Collector of Internal Revenue in San Francisco in the early part of 1921; to the best of my recollection it was about the middle of January, 1921. I had a second interview with him about the latter part of February, 1921. The first interview was in his office in the Customs House in San Francisco. At the first interview I stated that we had received a notice and demand for an assessment of approximately $130,000. and we could not understand why we had received such a notice for the reason that we had received from our attorney at Washington who had an appeal before the Income Tax Unit word that we had received a favorable decision regarding the assessment that had been made. The Collector of Internal Revenue, to the best of my recollection, examined some memoranda and informed me that the notice and demand had been sent out by a clerk in the department in error and to disregard it.

(Testimony of Charles F. Thompson.)

The second conversation with the Collector of Internal Revenue about the latter part of February, 1921, was held in the same office. In that second conversation I told Mr. Flynn, the Collector, that the result of our first interview had been referred to our attorney and auditors, and after a prolonged consul- [48] tation they decided that it would be advisable for me to go to the Collector of Internal Revenue and ask him for a letter stating the facts as he had stated them to me. The Collector objected to doing that but he said that we should file a claim in abatement. He told me that the claim in abatement was to be filed at his, the Collector's request. He stated that in view of the fact that the decision of the income tax unit was of record in Washington; that the notice of demand which we had received had been sent in error and to state that fact in our claim in abatement.

In pursuance of that conversation the claim in abatement was filed, a certified copy of which has been marked "Defendant's Exhibit I": [49]

DEFENDANT'S EXHIBIT No. I

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
Washington

July 10, 1929

PURSUANT to Section 822 of the Revised Statutes, I hereby certify that the annexed are true copies of Claim for Abatement of $132,227.47, In-

(Testimony of Charles F. Thompson.)

come and Profits Taxes for 1918 and 1919, filed by Jackson Furniture Company, Oakland, California; Bureau Record Copy of Certificate of Overassessment for 1918, allowing $51,184.90, (with pages 2 and 3 attached), in re: Jackson Furniture Company, Oakland, California the originals of which are on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary:

(Treasury Department Seal)

(Signed) F. A. BIRGFELD
Chief Clerk, Treasury Department.

Form 66—Revised June, 1927—TREASURY DEPARTMENT, Chief Clerk and Superintendent

U. S. Government Printing Office 1928 2-8615

[50]

TREASURY DEPARTMENT
Internal Revenue
Form 47—Revised May, 1920
Ed. 250,000

CLAIM FOR ABATEMENT
Taxes Erroneously or Illegally Assessed

Date of Filing to be
RECEIVED
Mar 1 1921
Plainly Stamped Here

(Testimony of Charles F. Thompson.)
State of California
City &
County of San Francisco.—ss.

IMPORTANT

This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received

4022

(Write Name so it can be easily read.)

Jackson Furniture Company
(Name of claimant).

1305 Clay Street, Oakland, California
Address of claimant; give street and number as well as city or town, and State.)

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant: Instalment Furniture.

2. Character of assessment or tax: Income and Profits tax.

3. Total of assessment: 1918, $97,442.63—1919, $34,784.84. Total, $132,227.47.

4. Amount now asked to be abated: Total of above amount $132,227.47

(Testimony of Charles F. Thompson.)

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

Our returns for 1918 and 1919 were made in accordance with Article 42 Regulations 45 and subsequently a Revenue Agent visited our office, reviewed our records and found additional taxes due as above, taking the stand that we could not report under the Regulation referred to. We at once protested to the Department, were given an oral hearing on October 18, 1920, and the Department at once wholly reversed the finding of the agent. This appears of record in the Department and the "notice and demand" were accordingly issued without the Collector having been advised of the situation. This matter was orally presented to Collector John L. Flynn on February 25, 1921 and this claim in abatement is filed pursuant to his instructions.

Signed:

JACKSON FURNITURE COMPANY
By H. K. JACKSON,
President.

Sworn to and subscribed before me this 28th day of February, 1921.

S. JACKSON
Notary Public in and for the County of Alameda, State of California. [51]

(Testimony of Charles F. Thompson.)

Income Tax Unit

TREASURY DEPARTMENT

Office of

COMMISSIONER OF INTERNAL REVENUE

Washington

CERTIFICATE OF OVERASSESSMENT

Number: 167227

Allowed: 51,184.90

Schedule No. 28610

IT:FAR:A4

MBE

Jackson Furniture Company,

13th and Clay Streets,

Oakland, California.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the year 1918 indicates that the tax assessed for this year was in excess of the amount due:

	Tax	Penalty
Tax assessed, November 1920, Page 34, Line 2	$92,802.50	$4,640.13
Tax Liability	46,257.73	
Overassessment	$46,544.77	$4,640.13

(See Pages 2 and 3 attached.)

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated:

(Testimony of Charles F. Thompson.)

if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

RECORD OF AUDIT AND REVIEW

Return audited: Date

Reviewed (unit) M. B. EASTMAN 8/23/27

by H. B. 8/27/27

REVIEWED: J. W. WARNER

Review section

Approved: Porter Snider

Head of Division

Approved: J. P. McLAUGHLIN 12/3/27

.....

Committee

gcc-2

District:

Interest:

Action	Initials	Date	
Return	KAM	1/3/28	
Stamped			
Schedule			
Checked			12/2/27

BUREAU RECORD COPY

(7776-C) Revised Apr., 1926 2-11665c [52]

(Testimony of Charles F. Thompson.)

Jackson Furniture Company		CERTIFICATE OF OVERASSESSMENT
Net loss reported, amended return		$ 26,885.31
Addition:		
1. Cash collection, 1917 accounts ($262,888.81 at 46.77%)		122,953.10
		$ 96,067.79
Deductions:		
2. Unrealized profits corrected	$161,933.12	
Unrealized profits, return	160,107.08	
		1,826.04
Net income corrected		$ 94,241.75
INVESTED CAPITAL.		
Capital stock, surplus and reserve, Exhibit A, Page 9, Revenue Agent's report dated October 22, 1923		$364,474.98
Reductions:		
3. Additional 1916 Federal tax	$ 164.43	
4. Federal tax 1917 ($9,785.57) prorated	5,388.72	
		5,553.15
Invested capital		$358,921.83
Average prewar invested capital		218,802.78
Increase		$140,119.05
EXCESS PROFITS CREDIT.		
8% of Invested Capital	$28,713.75	
Exemption	3,000.00	
	$31,713.75	
WAR PROFITS CREDIT.		
Average prewar net income		$ 27,245.87
Plus 10% of increase		14,011.91
Exemption		3,000.00
		$ 44,257.78

[53]

(Testimony of Charles F. Thompson.)

Rate % Capital	Net Income	Credit	Balance	Rate	Tax
20%	$71,784.37	$31,713.75	$40,070.62	30%	$12,021.19
Balance	22,457.38		22,457.38	65%	14,597.30
	$94,241.75	$31,713.75	$62,528.00		$26,618.49
Net income			$ 94,241.75		
			44,257.78		
Taxable at 80%			$ 49,983.97		
Tax at 80%					$ 39,987.18
Net income			$94,241.75		
Less:					
Excess profits tax		$39,987.18			
Exemption		2,000.00			
			41,987.18		
Taxable at 12%			$ 52,254.57		
Tax at 12%					6,270.55
Total tax liability					$ 46,257.73

The above changes are explained below:

1. Cash collections amounting to $262,888.81 on installment contracts for 1917 and prior thereto, received during the years 1918, have been prorated at the percentage of gross profit to gross sales for 1917 and included in taxable net income in accordance with Treasury Decision 3921, Cumulative Bulletin V-2, Page 24.

2. Taxable net income has been reduced on account of deferred profit correction as shown on Page 2, Revenue Agent's report dated October 22, 1923, copy of which has been furnished you.

3. Additional Federal taxes for 1916 are considered a liability of the taxable year in question. Invested capital has been reduced in accordance

(Testimony of Charles F. Thompson.)

with Advisory Tax Board Memorandum 51, Cumulative Bulletin I, Page 296.

4. Federal income tax has been prorated and invested capital reduced in accordance with Article 845, Regulations 45.

gcc-2

(Notation on back: 18413-L
Jackson Furniture vs. McLaughlin
Defendant's Ex. #1
File Mar. 1, 1934
Walter B. Maling, Clerk
By Harry L. Fouts
Deputy Clerk) [54]

Q. Mr. Thompson, I now show you a letter from the Treasury Department, dated January 29, 1925, purportedly signed by J. G. Bright, Deputy Commissioner, by M. Clute, head of division, and ask you whether or not this letter was received from the Treasury Department by the Jackson Furniture Company on or shortly after the date it bears date?

A. That is correct.

Mr. MACDONALD: I offer this in evidence as Plaintiff's Exhibit 1.

Miss PHILLIPS: I would like to make an objection to that as incompetent and immaterial. Further, it seeks to contradict in part the stipulation of facts which has already been offered in evidence. I think I will submit the motion and let your Honor

(Testimony of Charles F. Thompson.)

rule on it later, and we can argue that in the brief.

The COURT: I will withhold the ruling.

Thereupon said letter in words and figures as follows was read: [55]

PLAINTIFF'S EXHIBIT I
For Identification
TREASURY DEPARTMENT
Washington

Jan. 29, 1925

Office of
COMMISSIONER OF INTERNAL REVENUE

Address reply to
Commissioner of Internal Revenue
and refer to
IT:CA:2551-1
Jackson Furniture Company
14th and Clay Streets
Oakland, California.

Sirs:

Your claim for the abatement of $132,227.47, part of income and excess profits taxes for the years 1918 and 1919, has been examined.

The following action is based upon a ruling made by the Bureau after consideration of your protest.

The original returns for the years 1918 and 1919 were made on the basis of installment rates. The returns were not accepted because examination of your books disclosed that they were kept on the straight accrual basis. The submission of a supplemental brief, which pointed out in detail the pro-

(Testimony of Charles F. Thompson.)

cedure followed in keeping the books on the installment basis, forms the conclusion that the income reported on the installment basis can be correctly computed from your books.

A recomputation follows:

1918

NET LOSS

Net loss, as per Revenue Agent's Report dated November 13, 1923		$ 28,711.35
Tax assessed	$ 97,442.63	
Overassessment	$ 97,442.63	

1919

Net income	$123,605.04
Invested capital	$338,685.99

EXCESS PROFITS CREDIT

8% of invested capital	$ 27,094.88
Exemption	3,000.00
Total excess profits credit	$ 30,094.88

[56]

COMPUTATION OF TAX

Rate % Capital	Income	Credit	Balance	Rate % tax	Amount of tax
20	$67,737.20	$30,094.88	$37,642.32	20	$ 7,528.46
Balance	55,867.84	——	55,867.84		22,347.14
Total	$123,605.04	$30,094.88	$93,510.16		$29,875.60

Net income		$123,605.04	
Less:			
Profits tax	$29,875.60		
Exemption	2,000.00	31,875.60	
Amount taxable at 10%		$ 91,729.44	
Tax at 10%			9,172.94
Total tax			$ 39,048.54
Tax assessed			77,230.81
Overassessment			$ 38,182.27

(Testimony of Charles F. Thompson.)

The claim will be allowed.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281 of the Revenue Act of 1924.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner
By F. R. CLUTE,
Head of Division. [57]

PLAINTIFF'S EXHIBIT I.

Form NP-2

TREASURY DEPARTMENT
WASHINGTON

Office of
COMMISSIONER OF INTERNAL REVENUE

IT:FAR:A4
RPH-60D

Jackson Furniture Company, DEC 15 1927
13th and Clay Streets,
Oakland, California.

Sirs:

The determination of your tax liability for the years 1918, 1919 and 1920 discloses a deficiency of

(Testimony of Charles F. Thompson.)

$2,034.38 for 1920, overassessment in tax amounting to $75,127.21 for 1918 and 1919 and overassessment in penalty amounting to $6,296.55 for 1918 and 1919, as shown by the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C. and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the

(Testimony of Charles F. Thompson.)

attention of IT:FAR:A5:RPH-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,

Commissioner.

By C. B. ALLEN

Deputy Commissioner.

Inclosures:

Statement

Form A(2)

Form 7861-Revised Mar., 1926

Government Printing Office 2-13281. [58]

(Testimony of Charles F. Thompson.)

STATEMENT.

IT:FAR:A5
RPH-60D

In re: Jackson Furniture Company,
13th and Clay Streets,
Oakland, California.

Year	Deficiency in Tax	Overassessment	Overassessment Penalty
1918		$46,544.77	$ 4,640.13
1919		28,582.44	1,656.42
1920	$ 2,034.38		
Totals	$ 2,034.38	$75,127.21	$ 6,296.55
Net overassessment		$73,092.83	

(Tax for 1918 and 1919 assessed November 1920, page 34, Lines 2 and 3. Abatement claim rejected for $50,803.71.)

1918

Net loss reported, amended return		$ 26,885.31
Addition:		
1. Cash collection, 1917 accounts ($262,888.81 at 46.77%)		122,953.10
		$ 96,067.79
Deduction:		
2. Unrealized profits corrected	$161,933.12	
Unrealized profits, return	160,107.08	1,826.04
Net income corrected		$ 94,241.75

INVESTED CAPITAL

Capital stock, surplus and reserve, Exhibit A, page 9, Revenue Agent's report dated October 22, 1923		$364,474.98
Deductions:		
3. Additional 1916 Federal tax	$ 164.43	
4. Federal tax 1917 ($9,785.57) prorated	5,388.72	5,553.15
Invested capital		$358,921.83

[59]

(Testimony of Charles F. Thompson.)

Brought forward	$358,921.83
Average prewar invested capital	218,802.78
Increase	$140,119.05

EXCESS PROFITS CREDIT

8% of Invested Capital	$ 28,713.75	
Exemption	3,000.00	
	$ 31,713.75	

WAR PROFITS CREDIT

Average prewar net income	$ 27,245.87
Plus 10% of increase	14,011.91
Exemption	3,000.00
	$ 44,257.78

Rate % Capital	Net Income	Credit	Balance	Rate	Tax
20%	$71,784.37	$31,713.75	$40,070.62	30%	$12,021.19
Balance	22,457.38		22,457.38	65%	14,597.30
	$94,241.75	31,713.75	62,528.00		26,618.49

Net income		$ 94,241.75	
		44,257.78	
Taxable at 80%		$ 49,983.97	
Tax at 80%			$ 39,987.18
Net income		$ 94,241.75	
Less:			
Excess profits tax	39,987.18		
Exemption	2,000.00	41,987.18	
Taxable at 12%		$ 52,254.57	
Tax at 12%			6,270.55
Total tax liability			$ 46,257.73

[60]

(Testimony of Charles F. Thompson.)

Brought forward	$ 46,257.73	
Penalty		None
Tax previously assessed	92,802.50	
Penalty		$ 4,640.13
Overassessment of tax	$ 46,544.77	
Overassessment of penalty		$ 4,640.13

The above changes are explained below:

1. Cash collections amounting to $262,888.81 on installment contracts for 1917 and prior thereto, received during the year 1918, have been prorated at the percentage of gross profit to gross sales for 1917 and included in taxable net income in accordance with Treasury Decision 3921, Cumulative Bulletin V-2, Page 24.

2. Taxable net income has been reduced on account of deferred profit correction as shown on Page 2, Revenue Agent's report dated October 22, 1923, copy of which has been furnished you.

3. Additional Federal taxes for 1916 are considered a liability of the taxable year in question. Invested capital has been reduced in accordance with Advisory Tax Board Memorandum 51, Cumulative Bulletin I, Page 296.

4. Federal income tax has been prorated and invested capital reduced in accordance with Article 845, Regulations 45.

(Testimony of Charles F. Thompson.)

1919

Net income reported		$130,686.70
Addition:		
1. Cash collections on 1917 accounts ($32,342.15) at 46.77%		15,126.42
		$145,813.12
Reduction:		
2. Deferred profits corrected, amended return and Agent's report	$ 87,913.74	
Deferred profits, return	80,832.08	7,081.66
Net income corrected		$138,731.46

[61]

INVESTED CAPITAL

Capital stock, surplus and reserves, Exhibit A, Revenue Agent's report		$338,745.49
Addition:		
3. Overpayment 1917 Federal income tax ($9,890.50 minus $9,785.57)		104.93
		$338,850.42
Reductions:		
4. Additional Federal tax 1916	$ 164.43	
5. Federal tax 1918 ($46,257.73) prorated	19,548.52	19,712.95
		$319,137.47

EXCESS PROFITS CREDIT

8% of Invested Capital	$ 25,531.00
Exemption	3,000.00
	$ 28,531.00

(Testimony of Charles F. Thompson.)

Rate % Capital	Net Income	Credit	Balance	Rate	Tax
20%	$63,827.49	$28,531.00	$35,296.49	20%	$ 7,059.30
Balance	74,903.97		74,903.97		29,961.59
	$138,731.46	$28,531.00	$110,200.46		$37,020.89

Net income		$138,731.46	
Less:			
Excess profits tax	$ 37,020.89		
Exemption	2,000.00	39,020.89	
Taxable at 10%		$ 99,710.57	
Tax at 10%			9,971.06
Total tax liability			$ 46,991.95

[62]

Brought forward		$ 46,991.95	
Tax previously assessed		75,574.39	
Penalty			$ 1,656.42
Overassessment of tax		$ 28,582.44	
Overassessment of penalty			$ 1,656.42

The above changes are explained below:

1. Cash collections on 1917 and prior year installment contracts have been prorated at the percentage of gross profit to gross sales for 1917 and included in taxable net income in accordance with Treasury Decision 3921, Cumulative Bulletin V-2, Page 294.

2. Taxable net income has been reduced on account of deferred profit correction as shown in Revenue Agent's report and your brief, also amended return.

3. Overpayment of Federal tax for a prior year has been included in invested capital.

(Testimony of Charles F. Thompson.)

4. Additional Federal taxes are considered a liability of the taxable year in question. Therefore, invested capital has been reduced in accordance with Advisory Tax Board Memorandum 51, Cumulative Bulletin 1, Page 296.

5. Federal income tax has been prorated and invested capital reduced in accordance with Article 845, Regulations 45.

1920

Net income disclosed by books		$238,549.15
Additions:		
1. Donations		3,270.76
2. Life insurance premiums		946.30
3. Increase in reserve for losses		3,000.00
4. 1917 cash collection ($7,450.66 at 46.77%)		3,484.67
		$249,250.88
Reductions:		
5. Unrealized profits	$ 32,568.93	
6. Inventory adjustment	26,759.45	59,328.38
Net income corrected		$189,922.50

[63]

INVESTED CAPITAL

Capital stock, surplus and reserves		$443,422.12
Addition:		
7. Overpayment 1917 taxes		104.93
		$443,527.05
Reductions:		
8. Additional Federal taxes 1916	$ 164.43	
Additional Federal taxes 1918	46,257.73	
9. Federal tax, 1919 ($46,991.95) prorated	19,804.76	66,226.92
		$377,300.13

(Testimony of Charles F. Thompson.)

EXCESS PROFITS CREDIT

8% of Invested Capital	30,184.01
Exemption	3,000.00
	$ 33,184.01

Rate % Capital	Net Income	Credit	Balance	Rate	Tax
20%	$75,460.03	$33,184.01	$42,276.02	20%	$ 8,455.19
Balance	114,462.47		114,462.47	40%	45,784.99
	$189,922.50	$33,184.01	$156,738.49		$54,240.18

Net income		$189,922.50	
Less:			
Excess profits tax	$54,240.18		
Exemption	2,000.00	56,240.18	
Taxable at 10%		$133,682.32	
Tax at 10%			13,368.23
			$ 67,608.41

[64]

Brought forward			$ 67,608.41
Original assessment, March 1921, Number 401874		$61,047.07	
Original assessment, (amended) June 1921, Number 400044		4,526.96	65,574.03
Deficiency in tax			$ 2,034.38

The above changes in your tax liability are explained below:

1. Donations do not constitute an allowable deduction for income tax purposes and have been disallowed in accordance with Article 562, Regulations 45.

2. Life insurance premiums have been disallowed in accordance with Article 294, Regulations 45.

(Testimony of Charles F. Thompson.)

3. Increase in reserve for losses is not deductible. The reserves should be taken into consideration in the analysis of surplus account. An increase in a reserve should be charged to surplus rather than profit and loss.

4. Cash collections on 1917 contracts have been prorated at the percentage of gross profit to gross sales for 1917 and included in taxable net income in accordance with Treasury Decision 3921, Cumulative Bulletin V-2, Page 24.

5. Taxable net income has been reduced on account of deferred profits as shown on Page 2 of the Agent's Report.

6. Inventory as at the close of the year has been found to be overstated by the Revenue Agent in the amount shown on your claim. Therefore, net income has been reduced accordingly.

Relative to the bonus adjustment claimed, you are advised that there is no evidence with the case substantiating such a determination for this year.

Your claims for abatement of taxes assessed for 1918 and 1919, in the amount of $132,227.47 and claim for refund in the amount of $3,397.43 for 1919 will be adjusted in accordance with the foregoing.

Since there is a deficiency in tax for the year 1920, your claim for refund in the amount of $770.79 and credit in the amount of $9,073.06 will be rejected on the next schedule to be approved by the Commissioner. [65]

(Testimony of Charles F. Thompson.)

Under the provisions of Section 283(e) of the Revenue Act of 1926, this letter should be considered a notice under Subdivision (a) of Section 274 of the same Act and a petition may be filed with the United States Board of Tax Appeals covering the years 1918 and 1919.

The overassessments shown herein will be made the subject of Certificates of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 284 of the Revenue Act of 1926.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him. [66]

It was thereupon stipulated that said letter was received by plaintiff shortly after the date it bears.

TESTIMONY OF F. MANDELBAUM,
for Plaintiff.

(By Mr. MACDONALD) I have for many years been an attorney at law specializing particularly in the matter of income tax matters with the exception of the last two or three years, during which period I have not practiced; I have retired.

In 1920 I represented Jackson Furniture Company on behalf of Klink, Bean & Co., accountants

(Testimony of F. Mandelbaum.)

with whom I had been associated in the matter of Jackson Furniture Company's 1918-19 assessment. A hearing was had in the matter in Washington in October, 1920. I don't remember the year exactly but it was with respect to the assessment of the Jackson Furniture Company for prior years, I think it was 1918-19, but it is fourteen years since that time and I don't remember the identical year. But I think it was relative to that because that was the time of the excess profits tax.

I received a very distinct impression after conferring with them that we were entitled to report in accordance with Article 42, if I remember right, of Regulation 45. There was no written decision handed down. In the income tax unit they would sometimes indicate what their decision was and sometimes they would withhold it. But in this particular case I received a very distinct impression that we were entitled to report as we had reported. I went to Washington fourteen times in three and one-half years and each time I had something like seven or eight cases of importance and it was my custom if there was any decision or impression of decision to report by telegraph to my firm and have them communicate to the clients; and my impression is that I would send a telegram to my firm at that time telling [67] them of the impression that I had received of the decision.

Thereupon counsel for plaintiff made a motion for Findings of Fact and Conclusions of Law and for a declaration of law in favor of, and Judgment in favor of, plaintiff for $78,867.39, which motion of plaintiff was made on the ground that Section 705 of the Revenue Act of 1928 and the applicable Federal statutes should be reasonably interpreted so as to avoid a construction thereof of doubtful constitutionality. The court thereupon denied said motion, to which order of court counsel for plaintiff duly excepted and said exception is here designated as "Exception No. 2".

Thereupon counsel for plaintiff made a motion for Findings of Fact and Conclusions of Law and a declaration of law in favor of a Judgment in favor of plaintiff, awarding plaintiff judgment for $15,682.43 (representing the excess interest paid by plaintiff under protest applicable to the period prior to February 26, 1926), said motion being made on the ground that none of the Revenue Acts of the United States impose any interest against a taxpayer in plaintiff's situation for the period prior to February, 1926; that the Revenue Act of 1926 specifically provides that interest is not collectible against a taxpayer in plaintiff's situation for the period prior to the date of its passage and no other Act provides for interest for the period under consideration; that the law does not impose interest from the date of the erroneous or withdrawn assessment; that interest is not collectible during the

period that the validity of the taxes was in dispute; that interest does not depend upon fraud or negligence; that there was no proper notice or demand served in respect to the taxes now in dispute; that the fact that the determination of the tax was made after the 1926 Revenue Act, makes that Act controlling; that the 1926 statute is specific on the subject matter of interest, leaving no room for the application of any common law rule. [68]

The court thereupon denied said motion, to which order of court counsel for plaintiff duly excepted and said exception is here designated as "Exception No. 3".

Thereupon counsel for defendant made a motion for Judgment in favor of defendant. Thereafter the court granted said motion,—to which action of the court, counsel for plaintiff excepted and said exception is here designated as "Exception No. 4".

Thereafter counsel for plaintiq made a motion that the following Finding should be made:

"XLI.

"The first notice and demand for the payment of the deficiency in tax which was paid by plaintiff and the refund of which is sought herein was made on or about February 17, 1928.",

for the reason that such facts are supported by competent evidence and there is a total absence of competent evidence to support a contrary Finding. The court thereupon denied said motion,—to which

action of the court counsel for plaintiff excepted and said exception is here designated as "Exception No. 5".

Thereafter counsel for defendant made a motion that the following Finding should be made:

"XLI.

"A first notice and demand for payment of the deficiency assessment of November, 1920 was made on December 1, 1920 by the defendant Collector of Internal Revenue. A second notice and demand of the deficiency assessment made in November, 1920 was made on December 31, 1920 by the defendant, Collector of Internal Revenue.".

Counsel for plaintiff objected to the granting of said motion on the grounds that: (a) There was no competent evidence of the sending out of any notice prior to February 17, 1928. The Government's witness testified from certain pencil notations in his records but had no specific memory of having sent a notice to Jackson Furniture Company. Further, there was no testimony as to the form or contents [69] of the notice. (b) That November 20, 1920 assessment for the year 1918 was for $92,802.50. The deficiency finally determined on February 9, 1928 was for only about half this amount—$46,042.51 and was computed upon an entirely different theory of taxation. Therefore, any notice and demand which might have been sent with respect to the $92,802.50 was in no sense a notice and

demand for an entirely different amount based upon a different theory of taxation. The court thereupon overruled the objection of counsel for plaintiff to said motion, granted the motion of counsel for defendant and made the Finding immediately above quoted,—to which action of the court counsel for plaintiff duly excepted and said exception is here designated as "Exception No. 6".

Thereafter the District Court made and entered its Conclusions of Law as follows:

> "1. That plaintiff is not entitled to recovery of any of the principal or interest demanded by its complaint.
>
> "2. That defendant is entitled to a judgment in his favor with costs.
>
> "3. Let judgment be entered accordingly.",

to which action of the court counsel for plaintiff excepted and said exception is here designated "Exception No. 7".

Thereafter during the term of court at which the above entitled action was decided, counsel for the above named parties stipulated that the time of the parties to prepare and present the within bill of exceptions be extended and the time for plaintiff to prepare and serve its proposed amendments to plaintiff's proposed bill of exceptions be extended, which stipulations were duly approved by the above entitled court; that the said bill of exceptions and amendments thereto were presented within the stipulated time for allowance and settlement.

The foregoing bill of exceptions contains all the material [70] evidence offered and received at the trial of said cause, including all rulings made during the course of the trial which were excepted to by the plaintiff and exceptions allowed by the court.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is full and complete and the same may be settled, certified, approved and allowed as the bill of exceptions in the above entitled matter.

Dated: December 3, 1935.

ROBINSON, PRICE & MACDONALD
Attorneys for Plaintiff.

H. H. McPIKE, U. S. Attorney
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney
Attorneys for Defendant.

[Endorsed]: Filed Dec. 3, 1935. [71]

[Title of Court and Cause.]

ORDER ALLOWING BILL OF EXCEPTIONS.

The parties to the above entitled action, through their respective counsel of record, having stipulated in writing that the proposed Bill of Exceptions presented herewith, consisting of pages 1 to 52 inclusive, contains a full statement of the facts had upon the trial of the case and contains all the material evidence produced at the trial of said cause,

and the same having been duly considered by the Judge of this court who presided at the trial of said cause, and the same appearing in all respects proper;

IT IS ORDERED AND CERTIFIED that the above and foregoing instrument, consisting of pages 1 to 52 inclusive, be and the same is hereby approved, settled and allowed as the Bill of Exceptions in said cause.

By the Court:

Dated: December 3rd, 1935.

HAROLD LOUDERBACK
Judge of said District Court.

Attest:

.....
Clerk

[Endorsed]: Filed Dec. 3, 1935. [72]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

To the Honorable Harold Louderback, Judge of the District Court of the United States Northern District of California, Southern Division.

The above named plaintiff, feeling aggrieved by the Judgment entered in the above action on the 6th day of September, 1935, hereby appeals from said Judgment of the United States Circuit Court of Appeals for the Ninth District; that the errors

upon which said appeal is based are contained in the Assignment of Errors filed herewith; that petitioner prays that his appeal be allowed and that a citation be issued in accordance with law, and that an authenticated transcript of the records, proceedings and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Ninth *District* at San Francisco, California.

Your petitioner further prays that an order be made fixing the amount of security to be given by appellant, conditioned as provided by law.

Dated: December 3rd, 1935.

ROBINSON, PRICE & MACDONALD
Attorneys for Appellant. [73]

Appeal allowed upon appellant furnishing bond in compliance with law in the amount of $1,000.00 the same to be operated as a cost bond only.

Dated: December 3rd, 1935.

HAROLD LOUDERBACK
United States District Judge.

It is hereby stipulated that bond in the sum of $1000.00 or (One thousand dollars) by Standard Accident Insurance Co. is satisfying.

H. H. McPIKE, Attorney for Defendant,
By ESTHER B. PHILLIPS

Dated: Dec. 3, 1935.

Service of the within Petition by copy admitted this 3d day of December, 1935

H. H. McPIKE, Attorney for Def.
By ESTHER P. PHILLIPS [74]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the plaintiff herein and files the following assignment of errors upon which plaintiff will rely on appeal to the United States Circuit Court of Appeals for the Ninth *District*:

I.

The District Court erred in overruling plaintiff's objection to the defendant's question asked witness Joseph W. Reichlin on redirect examination as follows:

> "Q. Is there any difference between this form and form 17?
>
> Mr. MacDonald: I object to that as calling for the opinion of the witness and not the best evidence.
>
> The Court: I overrule the objection.",

to which ruling of the court counsel for plaintiff excepted and said exception is here designated "Exception No. 1".

II.

The District Court erred in overruling plaintiff's motion for Findings of Fact and Conclusions of Law and for a declaration of law in favor of, and Judgment in favor of, plaintiff for $78,867.39, which motion of plaintiff was made on the ground that [75] Section 705 of the Revenue Act of 1928 and the applicable Federal statutes should be reasonably interpreted so as to avoid a construction

thereof of doubtful constitutionality, to which action of the court counsel for plaintiff excepted and said exception is here designated "Exception No. 2".

III.

The District Court erred in overruling plaintiff's motion for Findings of Fact and Conclusions of Law and for a declaration of law in favor of, and Judgment in favor of, plaintiff, awarding plaintiff judgment for $15,682.43 (representing the excess interest paid by plaintiff under protest applicable to the period prior to February 26, 1926), said motion being made on the ground that none of the Revenue Acts of the United States impose any interest against a taxpayer in plaintiff's situation for the period prior to February, 1926; that the Revenue Act of 1926 specifically provides that interest is not collectible against a taxpayer in plaintiff's situation for the period prior to the date of its passage and no other Act provides for interest for the period under consideration; that the law does not impose interest from the date of the erroneous or withdrawn assessment; that interest is not collectible during the period that the validity of the taxes was in dispute; that interest does not depend upon fraud or negligence; that there was no proper notice or demand served in respect to the taxes now in dispute; that the fact that the determination of the tax was made after the 1926 Revenue Act, makes that Act controlling; that the 1926 statute is specific on the subject matter of interest, leaving no room for the application of any common law

rule, to which action of the court counsel for plaintiff excepted and said exception is here designated "Exception No. 3".

IV.

That the District Court erred in granting defendant's [76] motion for judgment, to which action of the court counsel for plaintiff excepted and said exception is here designated as "Exception No. 4".

V.

The District Court erred in refusing to find the facts as contained in plaintiff's requested Finding No. XLI, as follows:

"XLI.

"The first notice and demand for the payment of the deficiency in tax which was paid by plaintiff and the refund of which is sought herein was made on or about February 17, 1928.",

for the reason that such facts are supported by competent evidence and there is a total absence of competent evidence to support a contrary finding, to which action of the court counsel for plaintiff excepted and said exception is here designated "Exception No. 5".

VI.

The District Court erred in making and in entering Finding No. XLI, as follows:

"XLI.

"A first notice and demand for payment of the deficiency assessment of November, 1920

was made on December 1, 1920 by the defendant, Collector of Internal Revenue. A second notice and demand of the deficiency assessment made in November, 1920 was made on December 31, 1920 by the defendant, Collector of Internal Revenue.",

for the reason that: (a) There was no competent evidence of the sending out of any notice prior to February 17, 1928. The Government's witness testified from certain pencil notations in his records but had no specific memory of having sent a notice to Jackson Furniture Company. Further, there was no testimony as to the form or contents of the notice. (b) That November 20, 1920 assessment for the year 1918 was for $92,802.50. The deficiency finally determined on February 9, 1928 was for only about half this [77] amount—$46,042.51 and was computed upon an entirely different theory of taxation. Therefore, any notice and demand which might have been sent with respect to the $92,802.50 was in no sense a notice and demand for an entirely different amount based upon a different theory of taxation. That counsel for plaintiff duly excepted such Finding and such exception is here designated as "Exception No. 6".

VII.

The District Court erred in making and entering its Conclusions of Law as follows:

"1. That plaintiff is not entitled to recovery of any of the principal or interest demanded by its complaint.

"2. That defendant is entitled to a judgment in his favor with costs.

"3. Let judgment be entered accordingly.", for the reason that such Conclusions of Law are not supported by the facts found, to which action of the court counsel for plaintiff excepted and said exception is here designated "Exception No. 7".

VIII.

That the Judgment is contrary to law.

WHEREFORE the plaintiff and appellant pray that the Judgment in said cause be reversed and the cost remanded with instructions to the trial court as to further proceedings therein and for such other and further relief as may be just in the premises.

ROBINSON, PRICE & MACDONALD
Attorneys for Appellant.

Service of the within Assignment of Errors by copy admitted this 3d day of December, 1935.

H. H. McPIKE, Attorney for Defendant,
By ESTHER B. PHILLIPS
Asst. U. S. Atty.

[Endorsed]: Filed Dec. 3, 1935. [78]

[Title of Court and Cause.]

UNDERTAKING FOR COSTS AND DAMAGES ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Jackson Furniture Company, a corporation, as principal, and the Standard Accident In-

surance Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, and authorized to act as surety under the Act of Congress, approved August 13, 1894, whose principal office is located in the City of Detroit, State of Michigan, as surety, are held and firmly bound unto John P. McLaughlin, Collector of Internal Revenue, in the full and just sum of One Thousand and 00/100 ($1000.) Dollars, to be paid to the said John P. McLaughlin, Collector of Internal Revenue, his attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of December A. D. 1935.

Whereas, the Plaintiff in the above entitled action is about to appeal to the United States Circuit Court of Appeals, 9th Circuit, State of California, from a judgment made and entered against it, in said action in said Southern Division of the United States District Court, for the Northern District of California, in favor of the Defendant in said action, on the 6th day of September, A. D. 1935.

Now, the condition of the above obligation is such, That if the said Jackson Furniture Company, a corporation, shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

It is further stipulated as a part of the foregoing bond, that in case of the breach of any condition hereof, this Court may upon notice to us of not less than ten (10) days, proceed summarily in the action, suit, case or proceeding in which the same is given to ascertain the amount which such sureties are bound to pay on account of such breach, and render judgment therefor against us, and award execution therefor.

JACKSON FURNITURE COMPANY
By HENRY E. JACKSON
Vice-Pres.

STANDARD ACCIDENT
INSURANCE CO.
[Seal] By JOHN SIMPSON
Attorney in fact. [79]

State of California
County of Alameda—ss.

On this 3rd day of December in the year One Thousand Nine Hundred and thirty five before me, Wallace W. Knox, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared Henry E. Jackson known to me to be the Vice-President of the Corporation that executed the within instrument and the officer who executed the within instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, the day and year in this certificate first above written.

[Seal] WALLACE W. KNOX,
Notary Public in and for said County of Alameda, State of California.

State of California
County of Alameda—ss.

On this 3rd day of December, in the year One Thousand Nine Hundred and thirty-five before me, Anne F. Glover, a Notary Public in and for the said County of Alameda, residing therein, duly commissioned and sworn, personally appeared John Simpson, known to me to be the Attorney-in-fact of the Standard Accident Insurance Co., the Corporation that executed the within instrument and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County of Alameda the day and year in this Certificate first above written.

[Seal] ANNE F. GLOVER
Notary Public in and for the County of Alameda.

[80]

[Endorsed]:

I hereby approve of the within bond and the sufficiency of Surety therein.

HAROLD LOUDERBACK
Judge

December 4, 1935.

Filed Dec. 4, 1935. [81]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated between the parties hereto that the following shall be incorporated in the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth *District,* in the above entitled cause:

1. Complaint.
2. Answer.
3. Findings of Fact, Conclusions, and Judgment.
4. Bill of Exceptions; omitting, however, therefrom "Agreed Statement of Facts" found on pages 2 to 22 and inserting instead the following: "An 'Agreed Statement of Facts' was here introduced by which the parties agreed to the facts stated in paragraphs I to XL inclusive of the Findings of Fact."
5. Order settling Bill of Exceptions.
6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal.
9. Bond with approval thereon. [82]
10. Citation with admission of service.
11. This Stipulation.
12. Clerk's Certificate.

Appellant hereby waives the printing of the transcript in the manner provided by U. S. C. Title 28, Sec. 283 and requests the printing of the transcript by the Clerk of the Circuit Court of Appeals for the 9th *District.*

Dated: December 5, 1935.

ROBINSON, PRICE & MACDONALD
Attorneys for Plaintiff
and Appellant.

H. H. McPIKE, U. S. Attorney,
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney
Attorney for Defendant and
Appellee.

[Endorsed]: Filed Dec. 13, 1935. [83]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 83 pages, numbered from 1 to 83, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Jackson Furniture Company vs. John P. McLaughlin, Collector, etc., No. 18413-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Twelve and 65/100 ($12.65) Dollars and that the said amount has been paid to me by the Attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of December A. D. 1935.

[Seal] WALTER B. MALING,
Clerk.

B. E. O'HARA,
Deputy Clerk. [84]

[Title of Court and Cause.]

CITATION.

To John P. McLaughlin, Collector of Internal Revenue, Defendant in the above entitled action, greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, thirty days from and after the date this citation bears date, (or after the date of the order allowing the appeal) pursuant to an appeal allowed and filed in the office of the clerk of the District Court of the United States for the Northern District of California, Southern Division, from a judgment in said cause, filed and entered on the 6th day of September, 1935, wherein Jackson Furniture Company, a corporation is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Harold Louderback, Judge of the United States District Court for the Northern District of California, Southern Division, this 4th day of December, A. D. 1935.

HAROLD LOUDERBACK
Judge of the United States District Court for the Northern District of California, Southern Division. [85]

Due personal service of the within citation, by copy, is hereby admitted this 4th day of December, 1935.

H. H. McPIKE
Attorney for appellee.

[Endorsed]: Filed Dec. 4, 1935. [86]

[Endorsed]: No. 8077. United States Circuit Court of Appeals for the Ninth Circuit. Jackson Furniture Company, a corporation, Appellant, vs. John P. McLaughlin, Collector of Internal Revenue, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 20, 1935.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACKSON FURNITURE COMPANY
(a corporation),

Appellant,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue,

Appellee.

BRIEF FOR APPELLANT.

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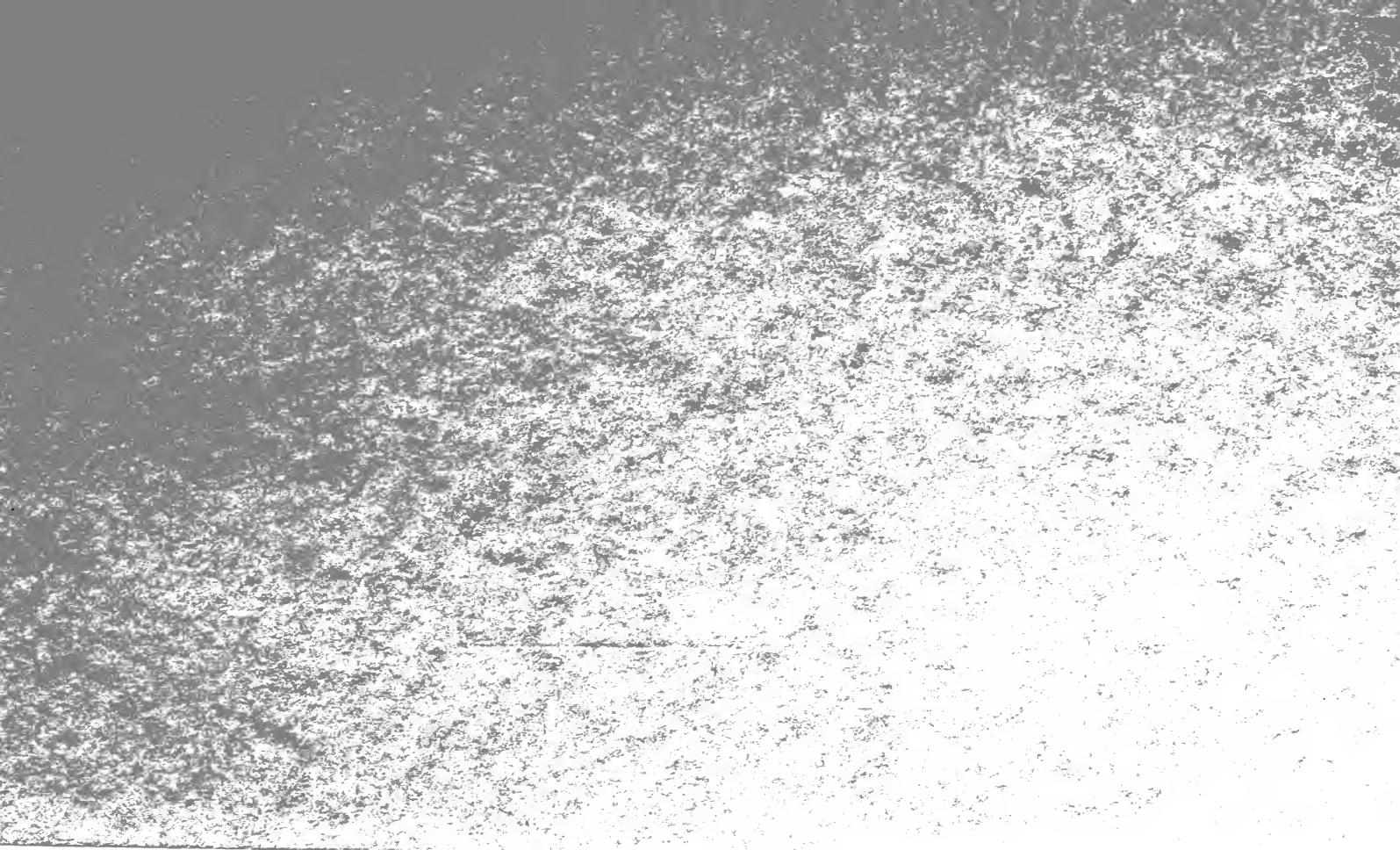

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No. 8077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACKSON FURNITURE COMPANY
(a corporation),
Appellant,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue,
Appellee.

BRIEF FOR APPELLANT.

A. STATEMENT OF THE CASE.

1. Summary of the facts.

This case involves income taxes and interest thereon assessed on February 9, 1928, against appellant for the years 1918, 1919, 1920 and 1921.[1] Said income taxes and interest were paid by appellant to appellee under protest on about February 27, 1928.[2]

Most of the facts appear from the uncontradicted allegations of the complaint and from the agreed statement of facts. The testimony which was introduced dealt principally with the various positions taken by the Treasury Department between the years

1. R. 7, 8, 36, 41.
2. R. 8.

1918-1928 with regard to these taxes and the facts dealing with appellee's giving notice of the tax to appellant.

From the uncontradicted allegations of the pleadings and from the agreed statement of facts, it appears that appellant, the owner of a large furniture store, effected a considerable portion of its sales on the instalment basis,[3] and in 1919 elected to file its returns on the instalment basis for 1918, and continued to do so for the years 1919, 1920 and 1921 and promptly made returns for each of said years on said basis and promptly paid the taxes according to said returns.[4]

It further appears that continuously between the years 1920 and 1928, appellant's liabilities for 1918-1921 income taxes with regard to its prior instalment sales was under consideration by the Treasury Department, which, during said period of time, made many conflicting and inconsistent decisions with regard thereto,—which inconsistent positions are illustrated as follows:

1920: Instalment sales provisions of the income tax law and of the regulations were illegal and, accordingly, appellant was not entitled to return on the instalment basis.[5]

1921: Instalment sales provisions of the income tax law and of the regulations were legal, but appellant's books did not disclose that they had been kept

3. R. 3.
4. R. 4, 5, 7.
5. R. 34.

on the instalment sales basis and, accordingly, appellant was not entitled to return on said basis.

1925: Instalment sales provisions of the income tax law and of the regulations were legal and appellant's books disclosed that they had been properly kept on the instalment basis and, accordingly, appellant was entitled to return on the instalment sales basis and had promptly paid its full income taxes on instalment sales.[6]

1927-1928: Instalment sales provisions of the income tax law and regulations were legal and appellant had properly kept its books upon the instalment sales basis, but new Treasury Department regulations, first promulgated in 1926, were to be interpreted retroactively to apply to 1918-21 transactions so as to double tax instalment sales receipts of the appellant for said years.[7]

Thereupon, in February 17, 1928, appellee caused to be served upon appellant the statutory notice and demand for the income taxes and interest involved in this case.[8]

On February 28, 1928, appellant paid under protest the double taxes and interest claimed in said notice and demand.[9]

By the Revenue Act of 1928, effective May 29, 1928, Congress *for the first time* enacted double tax provisions regarding instalment sales receipts,—said provisions to operate *prospectively* and not retro-

6. R. 77, 78.
7. R. 79, 80.
8. R. 7.
9. R. 8, 48.

actively. (Section 44(c).) In the same Act, Congress enacted remedial legislation (Section 705), which appellant contends conferred the right to recover double tax payments (paid under protest) on 1918-1921 instalment sales receipts.

Thereafter, appellant filed claims for refund of the double tax payments and interest thereon,[10] which claims were rejected in about November, 1928,[11] and thereupon appellant brought this suit to recover the same. The District Court made findings of fact[12] and conclusions of law[13] and rendered judgment for appellee.[14] Appellant appeals.

2. Incidental question involving facts and admission of testimony.

Aside from one issue of fact and one issue of law involving the admission of testimony, the issues involved in this case are solely those of substantive law. The issue of fact (dealing with facts proved by the evidence as to notice to the taxpayer) is discussed under topic D hereof. This issue was presented on appellant's motion for its proposed finding XLI, which was denied (specification 5), and appellee's motion for its finding XLI,[15] which was granted. (Specification 6.)[16]

The issue of law involving appellant's objections (specification 1) to the admission of testimony of a

10. R. 9, 36, 41, 52.
11. R. 15, 37, 42, 53.
12. R. 32.
13. R. 54.
14. R. 55.
15. R. 93.
16. R. 95.

witness giving his opinion as to the difference between two writings, one of which (although neither lost nor destroyed) was never presented in Court, is also discussed under said topic D.

3. **Questions of law involved as to the recovery of double tax on instalment sales.**

Appellant contends:

(a) Prior to the enactment of the 1928 Revenue Act, there was no law which provided that if a dealer in personal property elected to report on the instalment basis, said dealer must pay taxes twice on profits received during the taxable year,—where, as here, said profits were from instalment sales of earlier years and said profits had been returned as taxable income of said years, and the dealer had theretofore paid the full tax on said profits.

(b) The 1928 Revenue Act (44(c)) conferred upon the Government the right to tax twice the same instalment sales receipts, but limited the rights conferred to instalment sales to be received by the taxpayer *after* the enactment of the 1928 Revenue Act.

(c) The 1928 Revenue Act (Section 705) conferred upon taxpayers, in the position of this appellant, the right to recover the double taxes on instalment sales income,—where the taxpayer had been assessed twice upon the same instalment sales receipts and had theretofore paid under protest the said double tax assessments.

4. Questions of law involved as to interest on deficiency.

This case involves interest collected by appellee upon the income taxes of appellant for the years 1918 and 1919, as per assessment made on February 17, 1928. These assessments were paid under protest on February 27, 1928. In each instance appellee collected interest from a date prior to February 26, 1926, to date of collection. Appellant contends that in no event was appellee entitled to collect interest for the period prior to February 26, 1926. The amount of interest which appellee collected for this period prior to February 26, 1926, amounted to $15,682.43.[17] More specifically, appellant contends that:

Where, as here, the Treasury Department did not finally determine until 1928, either the theory or the amount of these taxes against appellant, and where the Treasury Department between the said years entertained various conflicting theories as to the tax, made a series of inconsistent computations as to their amount (varying from $132,227.47 to nil,[18] and where, as here, no notice of the tax was given prior to February 18, 1928,—(any previous notice having been sent out through error and disregarded by both parties hereto, following instructions of the appellee), then, 1. Section 250(b) of the Revenue Act is inapplicable. 2. Section 283(e) of the Revenue Act of 1928 is applicable.

The District Court came to a conclusion directly contrary to appellant's said contentions. The question of law on appellant's right to recover interest

17. R. 92.
18. R. 77, 78.

arose upon appellant's motions for findings and judgment, which the District Court denied,[19] and appellee's motion for judgment, which the District Court granted.

B. SPECIFICATION OF ERRORS RELIED UPON.

I.

The District Court erred in overruling plaintiff's objection to the defendant's question asked witness Joseph W. Reichlin on redirect examination as follows:

> "Q. Is there any difference between this form and form 17?
>
> Mr. MacDonald. I object to that as calling for the opinion of the witness and not the best evidence.
>
> The Court. I overrule the objection.",

to which ruling of the Court counsel for plaintiff excepted and said exception is here designated "Exception No. 1".

II.

The District Court erred in overruling plaintiff's motion for findings of fact and conclusions of law and for a declaration of law in favor of, and judgment in favor of, plaintiff for $78,867.39, which motion of plaintiff was made on the ground that Section 705 of the Revenue Act of 1928 and the applicable Federal statutes should be reasonably interpreted so as to avoid a construction thereof of doubtful consti-

19. R. 92.

tutionality, to which action of the Court counsel for plaintiff excepted and said exception is here designated "Exception No. 2".

III.

The District Court erred in overruling plaintiff's motion for findings of fact and conclusions of law and for a declaration of law in favor of, and judgment in favor of, plaintiff, awarding plaintiff judgment for $15,682.43 (representing the excess interest paid by plaintiff under protest applicable to the period prior to February 26, 1926), said motion being made on the ground that none of the Revenue Acts of the United States impose any interest against a taxpayer in plaintiff's situation for the period prior to February, 1926; that the Revenue Act of 1926 specifically provides that interest is not collectible against a taxpayer in plaintiff's situation for the period prior to the date of its passage and no other Act provides for interest for the period under consideration; that the law does not impose interest from the date of the erroneous or withdrawn assessment; that interest is not collectible during the period that the validity of the taxes was in dispute; that interest does not depend upon fraud or negligence; that there was no proper notice or demand served in respect to the taxes now in dispute; that the fact that the determination of the tax was made after the 1926 Revenue Act, makes that Act controlling; that the 1926 statute is specific on the subject matter of interest, leaving no room for the application of any common law rule, to which action of the Court counsel for plaintiff ex-

cepted and said exception is here designated "Exception No. 3".

IV.

That the District Court erred in granting defendant's motion for judgment, to which action of the Court counsel for plaintiff excepted and said exception is here designated as "Exception No. 4".

V.

The District Court erred in refusing to find the facts as contained in plaintiff's requested finding No. XLI, as follows:

"XLI.

> The first notice and demand for the payment of the deficiency in tax which was paid by plaintiff and the refund of which is sought herein was made on or about February 17, 1928.",

for the reason that such facts are supported by competent evidence and there is a total absence of competent evidence to support a contrary finding, to which action of the Court counsel for plaintiff excepted and said exception is here designated "Exception No. 5".

VI.

The District Court erred in making and in entering finding No. XLI, as follows:

"XLI.

> A first notice and demand for payment of the deficiency assessment of November, 1920, was

made on December 1, 1920, by the defendant, Collector of Internal Revenue. A second notice and demand of the deficiency assessment made in November, 1920, was made on December 31, 1920, by the defendant, Collector of Internal Revenue.",

for the reason that : (a) There was no competent evidence of the sending out of any notice prior to February 17, 1928. The Government's witness testified from certain pencil notations in his records, but had no specific memory of having sent a notice to Jackson Furniture Company. Further, there was no testimony as to the form or contents of the notice. (b) That November 20, 1920, assessment for the year 1918 was for $92,802.50. The deficiency finally determined on February 9, 1928, was for only about half this amount—$46,042.51 and was computed upon an entirely different theory of taxation. Therefore, any notice and demand which might have been sent with respect to the $92,802.50 was in no sense a notice and demand for an entirely different amount based upon a different theory of taxation. That counsel for plaintiff duly excepted such finding and such exception is here designated as "Exception No. 6".

VII.

The District Court erred in making and entering its conclusions of law as follows:

"1. That plaintiff is not entitled to recovery of any of the principal or interest demanded by its complaint.

2. That defendant is entitled to a judgment in his favor with costs.

3. Let judgment be entered accordingly.",

for the reason that such conclusions of law are not supported by the facts found, to which action of the Court counsel for plaintiff excepted and said exception is here designated "Exception No. 7".

VIII.

That the judgment is contrary to law.

C. BRIEF OF THE ARGUMENT ON THE RIGHT TO RECOVER DOUBLE TAXES.

By the 1918 Revenue Act, the Government for the first time invited instalment dealers in personal property to change their method of return from a strict accrual method to an instalment sales method. Appellant promptly availed itself of this invitation and has continuously since 1918 returned on said instalment sales method. As a consequence, the Government received the full tax on all instalment sales made prior to 1918 when appellant paid on its returns on the accrual basis for 1917 and prior years, and also received the full tax on instalment sales made in 1918 and subsequent years, when the taxpayer paid on his return of 1918 and subsequent years.

Appellant does not dispute the right of appellee to receive this full tax.

But the Commissioner in February 9, 1928, determined an additional tax against appellant for the years 1918 to 1921, inclusive. In 1928 the Commissioner required the appellant to include as gross income for said years (1918-1921, inclusive) instalment sales receipts on contracts made in 1917 and prior years, which receipts had been returned by appellant as income of appellant for the year 1917 and prior years. Appellant had theretofore paid the full income tax therein and these receipts had entered into appellant's surplus prior to the year 1918.

The imposition of double taxes by the Commissioner in February, 1928, on transactions occurring nearly ten years previous can only be justified by some clear statutory authorization, which said authorization is entirely lacking in this case.

We find that at no time prior to May 29, 1928, was there any statute which required taxpayers changing from the accrual method to the instalment method to pay a double tax on the taxpayer's income. It has been claimed that the Revenue Act of 1926 contained double tax provisions for the years of transition. This claim cannot be sustained. The only sections of the 1926 Act dealing with this subject matter are Sections 1208 and 212(d), and neither of them contain any double tax provision. No Revenue Act prior to that of 1928 contained any intimation that the taxpayer's acceptance of the Government's invitation to return on the instalment method would involve a penalty—that the taxpayer would be required to pay twice on the same income.

When, in May 29, 1928, double tax provisions were incorporated in the statute (Section 44(c)) for the first time, the Legislators took pains to provide that these double tax provisions could be given only prospective operation. Elsewhere in the 1928 Revenue Act the tax provisions were expressly given retroactive effect. It is significant that the Congress in 1928 determined that the severe penalty of double taxation should only be effective for transactions occurring after the enactment of the 1928 Revenue Act so that the taxpayer then electing to return on the instalment sales method would know the penalty which the making of such an election imposed.

It is probable that appellee will claim that this imposition of double taxation was justified by regulations of the Commission. We respectfully contend that such a claim is untenable, since a Federal Commission has no power to double tax or even to tax in the absence of clear statutory authority. Obviously, any regulation imposing double taxation would lack validity unless based upon clear provisions of Federal statutes. Since at this time such statutory authority was entirely lacking, double tax regulations must be also declared entirely lacking in legality.

Examining the regulations of the Commissioner in the years between 1918 and 1928, it is found that the instalment sales regulations are in an utterly confused condition. In 1918 returns were invited on the instalment sales method with no indication of double taxation. (Section 117, Regulation 33.) In 1919 double taxation on those who returned on the instal-

ment method was provided. (Article 42, Regulation 45.) In 1920 and 1921, it was provided that the use of the instalment method would entail no double taxation. (Article 42, Regulation 45; Article 42, Regulation 62.) In 1926 the regulations imposed double taxation on those using the instalment method, which method of returning had been provided by the Revenue Act. (Article 42, Regulation 69.)

Obviously, the regulations which imposed double taxation lacked statutory authority.

We are aware that the Federal Courts in several cases have upheld assessments computed in accordance with Regulation 69, Article 42.

John M. Brant Co. v. U. S., 40 Fed. (2d) 126;
Hoover Bond Co. v. Nauts, 42 Fed. (2d) 299;
Tull & Gibbs Inc. v. U. S., 48 Fed. (2d) 148,

and later Federal cases which have been based upon the doctrine of one or more of the above decisions.

We believe that in each of these cases are fundamental errors of fact or law which have led to an erroneous decision.

In *John M. Brant Co. v. U. S.,* supra, the Court erroneously assumed that the 1926 Revenue Act clearly contained double tax provisions when the facts are precisely to the contrary. The most that can be said is that there was a vague implication in the statute with regard to double taxation during the transition period. The Court in *Willcuts v. Gradwohl,* 58 Fed. (2d) 587, 590, correctly described the situation as follows:

> "The Act (the 1926 Revenue Act) contained no expressed provisions dealing with the transition period."

We believe it to be the law that where a statute, such as the 1926 Revenue Act, contains a mere implication as to double taxation, but does not require it by clear or express words, double taxation is not to be imposed.

Tennessee v. Whitworth, 117 U. S. 129, 137;
U. S. v. Supplee-Biddle Hardware Co., 265 U. S. 189, 196.

We believe that the Court in the *Brant* case arrived at an erroneous conclusion through a mistaken belief that the 1926 Revenue Act contained express or clear provisions imposing double taxation.

In *Hoover-Bond Co. v. Nauts,* supra, the Court relied on the *Brant* case and, accordingly, this decision is also erroneous. It can perhaps be said that the *Hoover-Bond Co.* case is also based upon the doctrine that if the taxpayer, having an option to return several ways, chooses one of said methods, the taxpayer must take such method subject to its burdens. The correct doctrine is that one who exercises such an option, takes with it the burden, at the time of the exercise of the option—which in this case was the burden of *single* taxation. It is obviously not the law that the exercise of an option carries with it the penalty of a burden first attached to the method years after the exercise of such option, and then only for prospective operation. The true doctrine of "cum

onere'' is that one who exercises an optional method must exercise such option subject to the *known* burdens existing at the time of the choice.

Holmes v. Danforth, 21 Atl. 843, 93 Maine 139.

Here, at the time appellant chose the instalment method of returning (1918), there was clearly no known burden of double taxation attaching to the method.

Tull & Gibbs, Inc. v. U. S., supra, is not an authority of the present case because it does not deal with a taxpayer who had filed an *original* instalment sales tax return prior to 1926. Said case deals with a taxpayer who, after 1926, filed an *amended* return for income earned six years prior, and thus attempted to secure retroactively the benefit of the instalment sales single tax method of returning.

Moreover, we believe that in so far as its decision is based upon the *Brant* and *Hoover-Bond* cases above criticized, the same is not supported.

So much for decisions relative to the law as it existed prior to the enactment of the 1928 Revenue Act.

We believe that counsel for appellee will agree with us that in 1928 the Congress was confronted with an ''exasperating and confusing uncertainty'' as to the instalment situation. There was no law authorizing double taxation, but there was a 1926 regulation which attempted to impose one. The Congress then enacted Section 44(c) of the 1928 Revenue Act which authorized double taxation for those who in the *future* would adopt the instalment sales method.

The Congress obviously avoided making the provision retroactive. The enactment of the *prospective* double tax provisions of Section 44(c) clearly indicated that the 1928 Congress knew that there had been no double tax statutory provisions prior to 1928.

The Congress at the same time enacted Section 705. Appellee interprets this section as meaning that Section 44(c) should be given retroactive effect. Appellant disputes this interpretation, partly on the ground that if the Congress had intended that this Section was to make Section 44(c) retroactive "it would have been so easy to have said so" in the simple language contained elsewhere in the Act where it is desired that provisions be retroactive.

We respectfully urge that the interpretation for which appellee is contending is neither reasonable nor rationable. Under appellee's interpretation, a dealer circumstanced exactly as appellant, except that he delayed paying his taxes for years prior to 1926 until a few days after May, 1928, was entirely freed from paying double taxes for said earlier years (*Redlick-Newman v. McLaughlin,* U. S. District Court, Northern District of California, Southern Division, 2d Division No. 18,693K); whereas appellant, who promptly paid said taxes within ten days after demand therefor, making such payment a few days before May, 1928, was herein required to pay double taxes.

We submit that appellee's interpretation is not only out of harmony with the other provisions of the 1928 Revenue Act, but involves absurd and unjust

consequences; makes this remedial section (705) apply the punishment of double taxation upon the law-abiding taxpayer who promptly pays, and at the same time confers the reward of single taxation on the procrastinating or hostile taxpayer who delays or refuses payment. That such an interpretation of revenue laws is destructive of their proper administration is obvious. That such construction, as between two such taxpayers similarly circumstanced, is of doubtful constitutionality is equally clear.

It is to be noted that the transactions here involved were fully consummated before the enactment of either the 1926 or the 1928 Revenue Acts. It is further to be noted that at the time of the enactment of the 1918 Revenue Act (which first permitted returns on the instalment sales method) appellant had paid all taxes on these instalment sales, for appellant in reporting said instalment sales on the accrual method had returned the *full* profit thereon and had paid the *full* income taxes thereon. It follows that any contention that Revenue Acts or regulations subsequent to the 1918 Revenue Act could validly retroactively again tax these tax-paid transactions, would seem to be contrary to the principles of the decisions of our Supreme Court in *Nicols v. Coolidge,* 274 U. S. 531, and *Blodgett v. Holden,* 275 U. S. 142.

Appellant admits that there is a conflict of authority on the question as to whether it has the right to avail itself of the remedial legislation incorporated in Section 705 of the 1928 Revenue Act. Appellee's interpretation of Section 705 is apparently supported

by several decisions based upon the decisions of *Willcutts v. Grodwohl,* 58 Fed. 587, and *Hoover-Bond Co. v. Nauts,* 59 Fed. (2d) 909. As we analyze the latter case, no reasonable interpretation of Section 705 was presented to the Court and the Court accordingly based its conclusion upon the former case. In the former case, it based its conclusions on the fallacious reasoning that when a taxpayer voluntarily chooses an optional method, a retroactive burden of double taxation on fully taxpaid transactions can validly thereafter be visited upon him, and on the further fallacious reasoning that if the purpose of Congress is to enact a statute of repose, such statute can reasonably be interpreted so as to reward a taxpayer for his law defiance and procrastination by single taxing him (*Redlick-Newman* case, supra), and so as to punish a taxpayer for obedience to law by prompt payment by double taxing him. It does not appear to us to be good law to hold that under the guise of enacting the statute of repose, the Congress intended to set up a system destructive of tax administration.

Later decisions upon which appellee relies follow the decisions of the two cases above criticized. On the other hand, the principles for which appellant argues have been supported by several decisions.

In *Jacobs Bros. Co. v. Commissioner,* 50 Fed (2d) 394 at 396, the Court said, with regard to Section 705:

> "Section 705 permits the taxpayer to exclude from the later years income tax collected on instalment contracts reported on the accrual method for years prior to the change of method."

In *Redlick-Newman v. McLaughlin,* supra, the Court held that a retail furniture instalment dealer who, as appellant, had reported on the instalment sales method, against the contentions of the Government that he had no right so to do, would, under the provisions of Section 705, escape double taxation through nonpayment of the tax until a few days after May 29, 1928. There is no logical distinction between appellant and the plaintiff in the *Redlick-Newman* case. In that case, Section 705 was so interpreted as to avoid double taxation where the taxpayer had prior to 1926 elected to return on the instalment sales method and paid the taxes on his sales. We respectfully submit that a similar conclusion should be here reached.

Moreover, it appears to us that under the principle upon which the Court decided the case of *Maus v. U. S. District Court,* Northern District, Western Division (Ohio), No. 3207 Law, decided March 8, 1928, judgment should be herein in favor of appellant. This case seems to justify the conclusion that at most Section 705 limited the "voluntary making of refunds and credits" by the *Commissioner* and did not limit recoveries by suit in the *Courts.* If any prohibition under Section 705 exists, it is against the making and allowing of refunds or credits by the Commissioner of Internal Revenue. It would appear from a study of the *Maus* case that a judgment obtained in a Federal District Court is a "judicial determination", and neither the recovery of such a judgment nor its subsequent payment is the "making" or the "allowing" of a "refund" or "credit",

and hence, recovery herein is not inhibited by said Section 705.

Summarizing. It will be noted that the following three conclusions can be drawn from our argument:

1. There exists no statutory provision or lawful authority for the imposition of double taxation on this appellant for its tax-paid transactions, i. e., instalment sales effected prior to 1918, upon which the full tax had been paid at the time of the sales, merely because instalment payments were made by purchasers in the years 1918 to 1921, inclusive. The conflicting regulations existing prior to 1928 cannot be relied upon as lawful authority for the imposition of the double taxation, for the reason that they are not based upon any clear or express statutory enactment.

2. The 1928 Revenue Act merely provided for double taxation against the taxpayer thereafter changing to the instalment basis (Section 44(c)) and recognizing the right to recover through the Courts double taxes theretofore paid where the taxpayer had returned on the instalment basis by an original return filed prior to 1926. (Section 705, Subdivision 1.) The purpose of this legislation was to dissipate the confusion caused by the conflicting regulations theretofore existing.

3. Even if the unreasonable assumption is made that no relief is offered by the provisions of Subdivision 1, Section 705, there existed no lawful authority for the imposition of double taxes against this appellant upon instalment sales transactions upon which the tax had been fully paid prior to the enactment of the 1918 Revenue statute.

Finally, we believe that appellee itself would admit that if the decision of the District Court is here sustained, an undeserved hardship will be visited upon this appellant. Had this appellant merely delayed payment for about three weeks, as did its competitor, it is clear appellant would escape double taxation. (See *Redlick-Newman* case, supra.) We submit that appellant should not be doubly taxed because it promptly paid its taxes. (With proper protest.)

We respectfully ask this Court to construe the remedial Section 705 so as to bring about a just result. We respectfully ask this Court in any event to hold that under the peculiar facts of this case, there is not any statutory authority for the imposition of these double taxes upon appellant.

D. BRIEF OF THE ARGUMENT THAT NO INTEREST IS HERE COLLECTIBLE FOR ANY PERIOD PRIOR TO FEBRUARY 26, 1926.

INTEREST ITEMS INVOLVED.

On November 20, 1920, the Commissioner of Internal Revenue assessed against appellant deficiencies, including penalties, of $97,442.63[20] and $34,784.84[21] for the years 1918 and 1919, respectively. Shortly thereafter claims of abatement were filed by the appellant to show that the notice with regard to such assessment was sent in error and should be thus regarded.[22] About eight years later, in February, 1928, the Commissioner came to a final determination

20. R. 34.
21. R. 38.
22. R. 67, 68.

with regard to said assessments and determined that appellant had been over-assessed to the extent of $46,544.77 and $4640.13 penalties for 1918,[23] $28,-582.44 and $1656.12 penalties[24] for 1919. The deficiencies were paid under protest by appellant on February 27, 1928, with interest, which said interest from December 31, 1920, amounted to $19,798.28 for 1918, $1954.77 for 1919, and $3220.94 for 1921.[25] Of the interest so paid, $14,273.18 out of said $19,798.28 covered the period prior to February 26, 1926, and $1409.25 out of said sum of $1954.77 covered the period prior to February 26, 1926.[26] The total interest collected by the Government for the period prior to February 26, 1926, accordingly, aggregated $15,682.43,[26] which is the amount of interest appellant claims it is entitled to here recover.

Appellant claims this right of recovery irrespective of whether it has the right to recover the principal sum for which it is suing. Appellant claims that under the peculiar facts of this case, Section 283(e) of the 1926 Revenue Act applies and under said section no interest could be collected by the Government for the period prior to February 26, 1926.

23. R. 36, 82.
24. R. 82.
25. R. 53.
26. R. 53, 92.

FIRST: THE REVENUE ACTS DO NOT IMPOSE ANY INTEREST FOR THE PERIOD PRIOR TO FEBRUARY, 1926.

(a) The Act of 1926 specifically provides that interest is not collectible against a taxpayer in appellant's position for the period prior to its enactment.

It is apparent here that the additional taxes in question were assessed prior to the passing of the 1926 Act, but were not "finally determined" until long after its passage, viz.: shortly before the date of payment in 1928, when the amount of said deficiency was finally determined to be $46,257.75. In making such "final determination", use was made of an old assessment of $97,472.63 levied in 1920 upon an entirely different theory from that on which the "final determination" was made by the Commissioner in 1928. The "final determination" in 1928 was for an amount only one-half as large as that of the assessment of 1920.

We respectfully submit that here the taxes were not "finally determined" until after the enactment of the 1926 Revenue Act. Accordingly, the provisions of Subdivisions (e) and (h) of Section 283 of the 1926 Act are controlling. The Government itself also is of the opinion that it was proceeding under the provisions of said Section 283(e) of the Revenue Act of 1926, for it so notified the taxpayer.[26a]

Subdivision (e) deals with the situation where an assessment was made prior to June 3, 1924, under the 1916, 1917, 1918 or 1921 Acts, and the deficiency was not "finally determined" until after the enactment of the 1926 Act. This is the classification within

26a. R. 90.

which the present case falls. As shown in the above statement of facts, here the 1918 and 1919 assessments were made prior to June 3, 1924, under the 1918 Act, viz.: on November 20, 1920. Here the deficiency was not "finally determined" until after the enactment of the 1926 Act, viz.: until about February 19, 1928. It is a significant fact that here when the liability was finally determined, after the enactment of the 1926 Act, it was determined upon an entirely different theory from that which had been maintained by the Commissioner prior thereto.

When the Congress in 1926 for the first time determined that interest should be charged against assessments under the 1916, 1917, 1918 or 1921 Acts, it adopted the equitable rule that interest should commence to run only from the date of any such change of policy—that is to say—from the date of the enactment of the 1926 Act itself, and in the last sentence of Subdivision (h) it adopted the equitable rule that interest from the date of enactment should be included only in cases where there is no other interest for the same period provided by law, thus preventing double interest for the same period.

(b) No other act provides for interest for the period now under consideration.

An examination of the Federal Revenue Acts will show that there is no provision in any of the Revenue Acts which imposes any interest with respect to the taxes now under consideration, i. e., taxes assessed prior to 1924 and not finally determined until February, 1928. (After the enactment of the 1926 Act.)

We believe that counsel for appellee will rely upon Section 250(e) of the 1918 Act. This section provides for interest only "after notice and demand by the Collector". The first and only demand by the Collector for this tax was in 1928 when the amount of this tax was determined.

In this case, the Government, although it originally made an additional assessment in *November, 1920,* for $97,442.63, made no final determination either as to the amount or theory of taxation for this additional assessment until *February, 1928.* In the interim between these two dates—November, 1920, and February, 1928—while there may have been determinations with regard to said tax—there never was any "*final* determination". These interim determinations varied, both as to amount and theory of taxation. Between these two dates the Government admitted that the amount of additional assessment should be nil,[27] and several times it claimed various amounts between the amount of nothing and $97,442.63. In the interim between November, 1920, and February, 1928, there was an equal amount of indecision upon the part of the Government with regard to the theory as to this additional assessment. On several occasions it utterly repudiated all theories by which an additional assessment could be imposed and decided—and so notified the taxpayer—that there was no deficiency. At other times it urged various theories and claimed various amounts—all of which were utterly at variance with those previously urged and those which it

27. R. 77.

finally determined upon. It might well be said that if there was any notice and demand prior to 1928 it was a notice whereby the taxpayer was notified that there was no additional assessment leviable against it; that was the purport of the Commissioner's letter of January 29, 1925.[28]

It is obvious that during this period while the Government was thus continuously changing its theories and the amounts of its claims, the only notice or demand which would be legally binding against the taxpayer would be a notice or demand for the proper amount—the amount actually due from the taxpayer. It is, of course, absurd to urge that any demand for an excessive amount, such as a demand for $97,442.63 when $46,042.51 is owed, will be of aid to a creditor—including the United States as a creditor—demanding payment against a taxpayer.

(c) There was error in admitting testimony with relation to notice and in making finding XLI with relation to same.

In this case the District Court (over proper objection) admitted incompetent evidence as to notice and apparently relied upon said incompetent evidence in making finding XLI.[29]

An unreliable witness with faulty memory, who contradicted himself as to material portions of his testimony, was permitted (over proper objections) to give his opinion on the difference between two notices,[30]—one of which was not produced in Court and

28. R. 77.
29. R. 54.
30. R. 65.

neither of which was introduced in evidence, without showing an adequate search for the primary document or any evidence of its destruction or loss.[31]

The witness testified merely that he had found no copy of the notice in his local office, but had made no effort to locate same, either at Washington or elsewhere.[32] Moreover, there was no showing whatsoever of the destruction or loss of the primary evidence.

Thus testifying as to the contents and legal effect of documents without any showing of the destruction or loss of the primary evidence or any adequate search therefor, the best evidence rule was violated.

Aetna Ins. Co. of Hartford, Conn. v. Bank of Brunson, 194 Fed. 385, 114 C. C. A. 303.

Moreover, the witness, in giving his opinion as to the differences between two documents, one of which was never produced in Court and neither of which was introduced in evidence, violated the rule with regard to the admission of opinion evidence. The question of whether a written instrument is a duplicate or different from another is not one upon which opinion evidence is competent.

Wright v. Mich. Central Ry. Co., 130 Fed. 843, 65 C. C. A. 327.

The error in the admission of the opinion is the more evident where, as here, only one of the instruments was in Court and, accordingly, neither the witness nor the Court would have any opportunity to make any comparison.[33]

31. R. 57, 63, 65.
32. R. 62, 66.
33. R. 66.

Prejudice was suffered by the admission of this incompetent testimony because, as we will hereafter show, the Court must have relied upon it in making finding XLI. The error in permitting the admission of this type of testimony becomes more evident when the unreliable character of the witness is considered. This witness, on cross-examination, admitted that he could not tell without referring to his books and records when he had sent out notice to appellant and yet, on direct examination,[34] testified that he could independently remember sending out a notice and demand to appellant in the latter part of 1920.[35] The unreliability of this witness is further shown when he swore that he had furnished the United States Attorney with Form 17 when he had actually furnished Form 117a.[36] This witness, who sent out notices at the rate of between 35,000 and 100,000 per year, was unable to remember the name of any party other than appellant to whom he had sent a notice in one of said years.[37]

It is obvious that no reliability can be placed upon the memory of a witness with a memory as convenient and faulty as that of this witness. Proper objection was made to this line of testimony on the ground that it was not the best evidence, and called for the opinion of the witness.[38] Prejudice is indicated by the fact that an unreliable witness with faulty memory was (in effect) permitted to testify as to the con-

34. R. 64.
35. R. 61.
36. R. 62, 65, 66.
37. R. 63.
38. R. 65.

tents and legal effect of the document and mentally compare it with another document, the contents of which he would be forced to recall from memory.

(d) There is no evidence in this case justifying the making of finding XLI.

Prejudice suffered by appellant by the admission of this testimony is further indicated by the fact that the Court must have relied upon it in making finding XLI. If this incompetent evidence is disregarded, there is left no evidence regarding any 1920 notice other than that appellee sent appellant some type of notice in the latter part of 1920 dealing with appellant's tax liability, but that appellee specifically instructed appellant to disregard said notice because appellee had sent it out in error and that appellee had further instructed appellant to establish of record the fact that said notice had been sent out in error and should be disregarded by filing a claim of abatement,—said claim to recite said error and said instructions to appellant; that appellant accordingly followed said instructions of appellee and established the error of record.[39]

Under these circumstances, appellee will not be permitted to say that this 1920 notice was a good and valid notice to be used against appellant.

Speake v. United States, 9 Cranch 28, 35.

As will be shown later in this brief, the parties thereafter dealt with each other on the assumption that the 1920 notice had never been given. The Government shifted its position several times—changing

39. R. 67, 68, 71.

its theories many times—the positions varying from one in which the Government claimed the entire instalment method invalid to one in which it claimed the entire instalment method valid,[40] to one in which it claimed the right to double tax all instalment sales to one in which it claimed the right to double tax instalment sales during the years of transition.[41] The amount involved varied from many thousands of dollars to nil.[42] It is obvious from reading the entire record that the first time that there was anything approaching a final determination of the tax liability justifying the sending out of any notice, was in February, 1928. In the meantime, the Government was confused by the provisions of the law, by its own regulations and by decisions of the Courts. We respectfully submit that the record here justified the giving by the District Court of finding XLI as requested by appellant. Appellant's proposed finding was as follows:[43]

"XLI.

> The first notice and demand for the payment of the deficiency in tax which was paid by plaintiff and the refund of which is sought herein was made on or about February 17, 1928."

We further submit that, as shown above, there is no competent evidence in this case to justify the making of finding XLI as incorporated in the findings of this case. This finding is worded as follows:[44]

40. R. 77.
41. R. 73.
42. R. 80.
43. R. 93.
44. R. 94.

"XLI.

A first notice and demand for payment of the deficiency assessment of November, 1920, was made on December 1, 1920, by the defendant Collector of Internal Revenue. A second notice and demand of the deficiency assessment made in November, 1920, was made on December 31, 1920, by the defendant, Collector of Internal Revenue."

Appellant duly objected to the inclusion of the above quoted finding and to the rejection of the finding proposed by it.[45] We respectfully submit that the District Court committed error in its ruling upon said appellant's motions, and that on this appeal the Court must consider the facts to be as established by the record in this case—that is to say—that the first notice and demand for the payment of the deficiency in tax which was paid by appellant and the refund of which is sought herein was made on about February 17, 1928.

It is the uncontradicted evidence in this case that if any notice and demand was sent out in 1920, it was sent out in error.[46]

Accordingly, Section 250(b) of the 1918 Act is inapplicable in that no proper notice or demand prior to 1928 for the taxes in question was proved. The alleged 1920 notice and demand relied upon by the Government was not sufficient to start the running of interest because:

45. R. 94.
46. R. 67, 68, 71.

(a) The Collector admitted that it was sent in error, and instructed appellant to act on that theory.[47]

(b) It was for an excessive amount.[48]

(c) It was for a tax later abandoned by the Government.[49]

(d) It was based upon a theory and upon figures later utterly repudiated by the Government, both in its letter of January 29, 1925, and in its final determination.[50]

Here, when the Commissioner recomputed the tax *in 1928* (after the taxpayer had been directed by the Collector in 1920 to file a claim of abatement in order to establish that the assessment had been made in error and notice thereof sent out in error and after the taxpayer had been advised by the Commissioner in 1925 that the assessment had been made in error), such attempted recomputation in 1928 was a new act at that time and could not "operate to reinstate or revivify the assessment as of a prior date". Under these circumstances the 1920 assessment cannot be relied upon by the Government as a basis for the computation of interest.

Carney Coal Co. v. Commissioner, 10 B. T. A. 1397.

Summarizing. The provisions of Section 250(b) of the 1918 Act are inapplicable and there can be no other conclusion but that the 1926 Act is the sole Act that provides for the imposition of interest against

47. R. 67, 68, 71.
48. R. 73.
49. R. 77.
50. R. 77, 73.

this taxpayer, against whom a final determination was first made *after* the 1926 Act.

We believe that if there ever was a case in which the provisions of Subdivisions (e) and (h) of Section 283 of the 1926 Act are applicable, it is the instant case. These subdivisions refer specifically to assessments made prior to 1926, but not finally determined until after 1926. What more exact example of a case of postponement of final determination until after 1926 can be presented than by the case at bar: a case where an additional assessment made in 1920 was at times totally abandoned by the Government—then partially restored—then totally abandoned—then partially restored for an entirely different amount, and finally determined in February, 1928, upon a theory and in an amount entirely different from that theretofore claimed.

SECOND: INTEREST IS NOT COLLECTIBLE DURING THE PERIOD THE VALIDITY OF TAXES WAS IN DISPUTE.

We respectfully submit that where the Government by its acts and vascillation over a long period of years has prevented the settlement of the taxes, where during that period of years it has continually changed its theory of tax liability, first assessing over $97,000.00 and then notifying the taxpayer that the said assessment of about $97,000.00 was entirely erroneous, admitting there was an over-assessment; thereafter making many inconsistent claims, and finally in 1928 claiming about $46,000.00, thereby admitting an over-assessment of about $46,000.00; where the delay,

not in payment but in the ascertainment of the true theory and amount of tax liability, is occasioned by the Government, the Government is not entitled to interest.

United States Trust Co. v. New Mexico, 183 U. S. 535;

State v. Certain Lands (Minn.), 42 N. W. 472; affirmed 159 U. S. 526;

State v. Great Northern Ry. Co., 200 N. W. 834; affirmed 278 U. S. 503;

Commonwealth v. S. P. Co. (Ky.), 183 S. W. 925.

THIRD: THERE WAS NO NOTICE AND DEMAND SERVED WITH RESPECT TO THE TAXES NOW IN DISPUTE UNTIL 1928.

The Government's very willing witness made some effort to prove that he made some kind of notice and demand the latter part of 1920, but he was not able to prove what notice he sent.[51] This is very important, in view of the fact that the amount of tax the Government was then contending for was just about twice the amount of the tax which it finally demanded in 1928, the interest upon which is now in dispute, and in view of the further fact that this notice was rendered of no effect by the Collector when he advised the appellant (in effect) that said notice should be disregarded, that it was sent out in error and that in order that the understanding of the parties to said effect could be established that appellant file a claim

51. R. 61, 65, 66.

of abatement so stating to establish said facts of record.[52]

Here, under the peculiar facts of this case, the claim of abatement cannot be used to establish that a proper and legal demand and notice had been given to appellant by Collector prior to 1926. On the contrary, the claim of abatement establishes that no proper legal demand or notice had been given to appellant by the Collector in 1920, and that any notice sent out at said time was to be disregarded by both the appellee and the appellant, for the reason that it was erroneously sent and appellee had instructed appellant to act on that theory.[53]

As a matter of fact, both parties actually did disregard said notice. We find that thereafter, in 1925, the Government advised appellant that appellant was under no liability for double taxes,[54] and we find that in about 1928 the Government finally determined that appellant was liable for a portion of the said double taxes.[55] It was at this time (in 1928) that the Government sent out the first demand which it desired the taxpayer to regard or which referred to the tax now in dispute.

If the Government is to be permitted to carry its interest period back to 1920, it must make proof that it gave proper notice and demand for taxes now in dispute and that it did not recall as erroneous the notice and demand which it is now relying upon.

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52. R. 67, 68, 71.
53. R. 67, 68, 71.
54. R. 77.
55. R. 36.

Where a creditor is afforded especial rights contingent upon giving proper notice and demand, such creditor cannot predicate his rights upon a notice or demand:

(a) which the creditor, immediately upon making the same, informs his debtor should be disregarded because it was erroneously sent; or

(b) which the creditor admits was for an excessive amount and based upon an erroneous theory, and which the creditor himself later and finally repudiates, both as to amount and theory.

While the above principles should, of course, be applied to every case wherein the above described situation is disclosed by the evidence, it is peculiarly fitting that these principles should be applied to the instant case where the Government is attempting to impose extra interest for the period several years prior to its final determination of the tax against a taxpayer whom the Government has admittedly doubly taxed to the extent of many thousands of dollars.

FOURTH: THE FACT THAT THE DETERMINATION OF THE TAX WAS MADE AFTER THE 1926 ACT MAKES THAT ACT CONTROLLING.

We have shown that Section 283 (c) and (h) of the 1926 Act controlled because the taxes were finally determined after the passage of that Act and the only assessment relied upon was one before that Act. We have further shown that there was "no other interest for the same period provided by law", be-

levied before, but the tax finally determined after, that date, interest should run only from the date of enactment of the 1926 Act. We have shown that there is no basis for the application of any earlier statute, because there never was any notice and demand served upon the taxpayer with respect to the taxes now in question. The only notice and demand upon which the Government relies is a notice with respect to a much larger tax levied upon a different theory, which said notice was erroneously sent, was recalled by the Collector, and was disregarded by appellant pursuant to instructions from the Collector.

We believe that we have shown under Section C hereof that judgment should be reversed and that appellant should be awarded the amount of double taxes and interest paid under protest.

We believe that we have shown under Section D hereof, that, irrespective of whether appellant is entitled to recover the principal amount here sued for, appellant is entitled to recover the interest amounting to $15,682.43, collected for the period prior to February 26, 1926.

Dated, Oakland, California,
March 9, 1936.

Respectfully submitted,
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No. 8077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACKSON FURNITURE COMPANY
(a corporation),

Appellant,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue,

Appellee.

On Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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On Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

OPINION BELOW.

The Court below made special findings of fact and conclusions of law but did not file any opinion in this case. (R. 32-55.)

JURISDICTION.

Judgment was entered in the District Court on September 7, 1935, dismissing the action. (R. 55.) Appellant's appeal from that decision was prayed and allowed on December 3, 1935, and duly perfected. (R.

97-110.) The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Where appellant changed from the accrual basis as of January 1, 1918, and made its returns of income upon the installment basis for the years 1918 to 1921, inclusive, should amounts actually received during those years on account of installment sales made in prior years be excluded in the computation of income for the taxable years?

2. Is the appellant subject to interest accruing prior to February 26, 1926, with respect to deficiencies in his 1918 and 1919 income taxes where assessment, notice and demand for their payment were made during 1920, claims for abatement filed during 1921 and finally allowed in part during 1927, and the unabated portions of such assessments were paid on February 27, 1928?

3. Is the finding of the District Court, as to when the disputed tax deficiencies for the years 1918 and 1919 were assessed and when the first and the second notice and demand for their payment were made, supported by such substantial evidence as to be binding and conclusive upon this Court?

STATUTES AND REGULATIONS INVOLVED.

These are set forth in Appendix A, *infra,* pp. i-xxiv.

STATEMENT.

Appellant sues in assumpsit to recover deficiencies of income taxes for the years 1918 to 1921, inclusive, and interest thereon aggregating $77,127.51, which were paid on February 27, 1928, to the appellee Collector of Internal Revenue, plus interest upon the aggregate sum since its payment. (R. 2-15.) Appellant also seeks to recover $15,763.16 of that aggregate sum as an alleged illegal exaction of interest, irrespective of the validity of the tax deficiencies upon which such interest was paid. (R. 14.)

The facts are set forth in the special findings of the trial Court (R. 32-54), and are largely undisputed. The parties stipulated that the facts set forth in Findings Nos. I to XL, inclusive, are agreed facts and are based upon an agreed statement of fact submitted at the hearing. (R. 57, 107.) The facts embodied in Finding No. XLI as to the time of assessment, notice and demand for payment of the 1918 and 1919 tax deficiencies (R. 54), are supported by substantial evidence consisting partly of the written agreed statement of facts (R. 34, 38), partly of documentary evidence (R. 70-71), and partly of oral testimony of witnesses examined at the hearing. (Thompson, R. 67-68; Reichlin, R. 58-65.)

The facts are briefly summarized here as follows:

During and for some years prior to the taxable years involved, the appellee was engaged in the business of selling furniture largely upon the installment plan. Its books were kept and its income was returned upon the accrual basis for all years prior to and including the calendar year 1917, and the taxes duly assessed

upon that basis for those years were fully paid and are not now in question. The income and/or profits taxes so paid for each of those years were computed by including in gross income the total accrued profit included in the entire sale price of all installment sales made during each of those years, even though some of the installment payments were not actually received until after the termination of the taxable year when the sales were made. (R. 3-4, 28.)

Commencing with the calendar year 1918, appellee elected to change from the accrual basis to the installment basis of reporting its income, and undertook to file returns on the installment basis for all of the calendar years 1918 to 1921, inclusive, now in question. (R. 32-33, 38, 42-43, 49.) In making said returns [1] upon the installment basis, appellant did not include in taxable income for the four years now in question any part of the sums actually collected during the taxable years on account of installment sales made in 1917 and prior years. (R. 33, 38, 44, 49.)

Under said original and/or amended return, net income was reported and taxes were assessed and paid as follows:

For the year 1918.

A net loss was reported in the sum of $26,885.31, and no tax was either admitted to be due or paid under the original or amended returns. A deficiency of tax of $92,802.50 for 1918, together with penalty of $4640.13,

1. This includes amended returns filed for the years 1918 and 1920. (R. 33, 42-43.) The Commissioner's subsequent adjustments to the reported income were based upon the amended returns for those two years (R. 35, 46), and upon the income disclosed by the original returns for the years 1919 and 1921. (R. 37-40, 49-51.)

aggregating $97,442.63, *was assessed* against appellant on an assessment list signed by the Commissioner of Internal Revenue *on November 20, 1920.* (R. 33-34.) That deficiency was assessed upon the basis of the Commissioner's determination that appellant was not entitled to report its income upon the installment basis and that its tax liability should be computed on an accrued net income of $150,603.61 and invested capital of $357,464.52 for that year. (R. 33.)

Said 1918 deficiency assessment of $97,442.63 was credited on March 9, 1923, by an overpayment of 1917 tax of $215.22, leaving a balance then outstanding under that assessment of $97,227.41. (R. 34.)

In the meantime, the Collector of Internal Revenue had made first notice and demand upon appellant for the payment of this 1918 deficiency assessment on or about December 1, 1920, and made a second notice and demand for its payment on or about December 31, 1920. (R. 54, 70-71, 67-68, 58-65.) On or about March 1, 1921, appellant filed a claim for abatement in the total sum of $132,227.47 for the years 1918 and 1919, which included the total deficiency assessment for the year 1918 then outstanding in the sum of $97,442.63 above mentioned, upon the ground that its income should be computed upon the installment basis under Article 42, Regulations 45. (R. 34, 70-71.) Appellant in that claim for abatement admitted the previous receipt from the Collector of "notice and demand" for payment of the 1918 and 1919 deficiency assessments then outstanding against it. (R. 70-71.)

During the year 1927, the Commissioner caused a re-examination and reaudit to be made of appellant's

books and records for the year 1918 to 1921, inclusive; and as the result of that reaudit the Commissioner determined appellant was entitled to report its taxable net income on the installment basis for 1918 and the three succeeding years now in question. (R. 35, 39, 45-47, 51.) Upon that basis, the Commissioner, among other things, allowed an overassessment for the year 1918 of tax of $46,544.77 and penalty of $4640.13, aggregating $51,184.90 on a schedule signed *February 9, 1928.* The 1918 deficiency assessment then outstanding was accordingly abated to the extent of $51,184.90, leaving a balance then outstanding of $46,042.51 on that assessment. After another notice and demand from the appellee Collector, appellant on *February 28, 1928, paid* $65,840.79, representing the tax balance of $46,042.51, together with interest of $19,798.28, computed upon the rejected portion of appellant's claim for abatement of $97,442.63 for 1918. (R. 36.)

Of the interest so paid, $14,273.18 accrued upon said unabated deficiency assessment of $46,042.51 between December 31, 1920, and February 26, 1926, the effective date of the Revenue Act of 1926. (R. 53.)

Appellant, on October 17, 1928, filed a claim for refund of $86,904.54 for the years 1918 to 1921, inclusive, which claim covered the above-mentioned payments of February 28, 1928, on 1918 tax and interest to the extent of $65,840.79, and set up therein the same grounds for recovery relied upon in the complaint herein, and the Commissioner rejected that claim in full on a schedule signed November 23, 1928. (R. 20, 37.)

For the year 1919.

For the year 1919, appellant filed its original return on May 15, 1920, reporting net income of $130,686.70 and tax due of $42,445.97, and paid that tax in installments ending December 14, 1920. (R. 37.) Thereafter the Commissioner determined the net income was $215,874.40, and assessed a deficiency of tax against appellant in the sum of $33,128.42, together with a penalty of $1656.42, aggregating $34,784.84 upon an assessment list *signed November 20, 1920.* (R. 37-38.) The Collector made first notice and demand for payment of that deficiency assessment on or about December 1, 1920, and made a second notice and demand for its payment *on December 31, 1920.* (R. 54, 70-71, 67-68, 58-65.)

On or about March 1, 1921, appellant filed claim for the abatement of $132,227.47 for the years 1918 and 1919, which covered the deficiency assessment of $34,-784.84 for the latter year mentioned next above. (R. 39, 70.) The Commissioner allowed that claim for abatement as to the year 1919 by issuing a certificate of overassessment of tax of $28,582.44 and penalty of $1656.42, aggregating $30,238.86, on a schedule approved February 9, 1928, and rejected the claim for abatement as to the balance of $4545.98 then outstanding upon the November 1920 deficiency assessment for that year. (R. 41, 82, 86.) Appellant paid that balance of $4545.98, plus interest of $1954.77, computed upon said rejected portion of the claim for abatement, aggregating $6500.75, on February 28, 1928. (R. 41.) Of the interest so paid, $1409.25 accrued upon $4545.98 of the 1919 deficiency assessed on November 20, 1920,

between December 31, 1920, and February 26, 1926. (R. 53.)

Claim for refund of $86,904.54, which covered the sum of $6500.75 so paid for the year 1919 and set up the grounds for recovery presented here, was filed on October 17, 1928, and rejected on November 23, 1928. (R. 41-42.)

For the year 1920.

For the calendar year 1920, original return was filed on March 15, 1921, reporting tax due of $61,047.07, and a first amended return was filed on June 13, 1921, indicating a total 1920 tax liability of $65,574.03 or an additional tax of $4526.96 over the sum reported in the original return. The total tax of $65,574.03 so reported was paid by appellant in installments commencing March 15, 1921, and ending December 15, 1921. (R. 42-43.)

On March 11, 1922, appellant filed its second and final amended income and profits tax return for this same taxable year showing amended net income of $169,846.46 and indicating a total tax liability of $55,750.18 or an overpayment of taxes of $9843.85 under its original and first amended returns for the year 1920. (R. 43-44.)

On March 11, 1922, appellant also filed a claim for reduction of its 1920 taxes to the extent of the alleged overpayment of $9843.85 just mentioned, and for credit of $9073.06 of said alleged overpayment for 1920 upon its reported tax liability for 1921, and for refund of the balance of said alleged 1920 overpayment or $770.79. Subsequently, and after various ad-

justments were made by the Commissioner, which are not now in question, the appellant conceded the propriety of the Commissioner's adjustments as supporting the validity of $7005.31 of the amount of 1920 tax claimed as a credit upon the 1921 tax. (R. 44.) That claim for credit and refund of $9843.85 as an alleged overpayment of the 1920 tax was rejected by the Commissioner on February 18, 1928. Thereupon, on March 28, 1928, appellant paid its original outstanding tax of $9073.06 for the year 1921, with interest thereon of $3220.94, aggregating $12,294.00, as again referred to hereinafter under the taxable year 1921. (R. 45, 52.) At the same time, the Commissioner determined that there had been no overpayment of the 1920 tax under appellant's original and first amended return for that year (which tax had theretofore been reported and paid in the aggregate sum of $6574.03). The Commissioner also determined that the correct net taxable income for that year was $189,922.50, the total tax due was $67,608.41, and that a deficiency existed in the sum of $2034.38. (R. 45-47.) On December 15, 1927, the Commissioner issued the prescribed statutory notice of such tax deficiency for the year 1920, and when appellant waived its right of appeal from such determination to the Board of Tax Appeals, the Commissioner assessed said 1920 deficiency of $2034.38, plus interest thereon of $234.62, aggregating $2269.00 on an assessment list signed January 28, 1928. The appellant paid that assessment on February 28, 1928. (R. 47-48.) On October 17, 1928, appellant filed the above-mentioned claim for refund of $86,904.54 for the several taxable years involved here-

in, which claim covered, among other items, the 1920 payment of tax and interest aggregating $2269.00 just mentioned, and the Commissioner rejected that claim for refund in full on a schedule signed November 23, 1928. (R. 48.)

For the year 1921.

For this taxable year, appellant filed its return on March 11, 1922, reporting net income of $62,154.71 and tax due of $9073.06. It also filed on the same day a claim for credit to the extent of $9073.06 upon the reported 1921 tax of an alleged overpayment in the 1920 tax of $9843.85, and for refund of the balance of the alleged 1920 overpayment, as hereinbefore mentioned. Appellant did not, in view of the filing of that claim for credit, pay any of the tax reported due for the year 1921 until after the claim for credit had been acted upon by the Commissioner. (R. 49.) Appellant's claim for credit and refund of $9843.85, as an alleged overpayment of its 1920 tax, was rejected in full by the Commissioner on a schedule signed by him February 18, 1928; and thereupon, on March 28, 1928, appellant paid its outstanding original tax for 1921 of $9073.06, with interest thereon of $3220.94, aggregating $12,294.00 to the appellee Collector. (R. 52.)

Upon audit of the 1921 return, the Commissioner increased appellant's net income from $62,154.71 as reported to $77,633.38, and determined a tax deficiency for that year of $4128.49 upon that basis. (R. 51.) On June 23, 1927, the Commissioner sent plaintiff the prescribed statutory notice of this 1921 tax deficiency. Appellant did not appeal from same to the Board of

Tax Appeals, and on September 3, 1927, the Commissioner assessed said tax deficiency of $4128.49, with interest thereon of $1261.76, aggregating $5390.25, on an assessment list, which he signed September 3, 1927. Appellant paid that deficiency assessment in full on October 18, 1927. (R. 51, 52.) On October 17, 1928, appellant filed the claim for refund of $86,904.54 hereinbefore mentioned, which claim covered, among other items, taxes and interest paid for the year 1921 to the extent of $12,294.00 and relied upon the same grounds for recovery which are set forth in the complaint herein. The Commissioner rejected that claim in full on a schedule signed by him November 23, 1928. (R. 52-53.)

As to the several years involved.

The two deficiency assessments of $97,442.63 for 1918 and $34,784.84 for 1919, which the Commissioner made on November 20, 1921, were based, so far as material here, upon the Commissioner's determination that appellant was not entitled to report its income for those two years on the installment basis and under a computation of the income which the Commissioner then made upon the accrual basis for those two years. (R. 33, 38.) The Commissioner's subsequent action in February, 1928, allowing claims for abatement of the 1918 deficiency assessment to the extent of tax and penalty aggregating $51,184.90, and of the 1919 deficiency assessment to the extent of tax and penalty of $30,238.86, under which the appellant paid the unabated portions of those two deficiency assessments plus interest accrued thereon in February,

1928, was based upon the determination that appellant was entitled to report its income for these two years on the installment basis, but in so computing the income, it was necessary to include items representing proportionate profits realized through actual collections received in 1918 and 1919 on account of installment sales which had been made in 1917 and prior years. (R. 35, 40.) The disputed items which the Commissioner thus added to reported income for these two years consisted of sums of $122,953.10, added to the 1918 income (R. 35) and $15,126.42, likewise added to the 1919 reported income. (R. 40.)

Appellant's returns for the years 1920 and 1921 were made on the installment basis, and under what has been called by some of the Courts the "single-tax" rule, or with all items of income excluded therefrom which related to installment collections during those two taxable years on account of sales made in 1917 and prior years. (R. 43-44, 49.) The Commissioner's determinations of deficiencies for these last two years did not disturb the installment method of computing income as used in the appellant's returns, but were based, so far as material here, upon the inclusion in the 1920 and 1921 taxable income of proportionate installment profits attributable to actual collections during those two taxable years on account of sales made in 1917 and prior years. The items of income so added to reported income under the installment method, and which are in controversy in this action, amount to $3484.67 for 1920 (R. 46), and $688.96 for 1921. (R. 51.)

All of the taxes paid for the years 1918 to 1921, inclusive, which are in controversy here, were determined by the Commissioner to be due, assessed and/or paid on various dates between November 20, 1920, and March 28, 1928, or prior to the date of enactment of the Revenue Act of 1928. (R. 34-53.) The only action taken by the Commissioner respecting any of these four taxable years subsequent to the date of the enactment of that Act was his rejection on November 23, 1928, of claim for refund for all four years which the appellant had filed on October 17, 1928. (R. 37, 42, 48, 53.)

The effective date of the Revenue Act of 1926 is February 26, 1926, and the effective date of the Revenue Act of 1928 is May 29, 1928.

All of the taxes in controversy were assessed and/or collected within either the original prescribed statutory time for such purposes or within extensions of such time under a series of written waivers executed by the parties (R. 34, 39, 45, 50), and no question of the statute of limitations is raised here by either party.

SUMMARY OF ARGUMENT.

The first question presented here should be answered in the negative, the second one in the affirmative, and the third one in the affirmative.

Although the earlier revenue acts did not expressly recognize any methods of computing and reporting income except the accrual method and the cash

receipts and disbursements basis, the Treasury Regulations under same provided that an installment merchant could elect to report his income on the installment basis, or in the year when proportionate profits from sales were actually realized through installment collections without regard to the taxable year in which the sales had been made. This involved double taxation to a certain extent during the years between the change from the accrual basis until all collections had been made on account of sales in years prior to such change. The earlier regulations under the 1918 Act required *all* such installment collections to be included in gross income for any year reported by the taxpayer upon the installment basis, and this was called the "double-tax" rule. The regulations were amended from October, 1920, through the year 1924, so as to eliminate any double taxation during the period of transition, and these amended regulations thus undertook to apply the "single-tax" rule. After the Board of Tax Appeals in 1925 upset the whole system of installment income regulations by holding same invalid, express provision was made both prospectively and retroactively under Sections 212 (d) and 1208 of the Revenue Act of 1926 for the optional use of the installment basis by installment merchants. The various Appellate Courts, including this Court, have consistently interpreted that retroactive legislation as requiring the application of the so-called "double-tax" rule to installment collections actually received by the taxpayer in any taxable year during the "period of transition" from the accrual to the installment basis. Both the wording of the statute

and its legislative history compel that construction of the statute, and when so construed, it is not rendered unconstitutional by reason of any resulting double taxation of some of the income. Furthermore, the appellant is in no position to complain of the burdens incident to a method of computing and reporting his income which he voluntarily chose to use.

Sections 44 and 705 of the Revenue Act of 1928, when read together for retroactive application to prior taxable years, constitute a rather unusual piece of legislation. Their legislative history and the history of installment income cases arising under the earlier statutes show conclusively that Congress had a very peculiar situation to deal with in applying statutes of repose to the taxable years 1916 to 1924, as far as could be done without undue or unreasonable hardship on installment merchants as a special group of taxpayers or being unfair to all the other taxpayers as a whole, where some taxpayers' returns had been made, audited and closed under "single-tax" regulations while other taxpayers' returns for the same years had been made and closed under the "double-tax" regulations.

Congress considered that in the former group where many cases were still open under the statute of limitations or waivers executed, pending determination of other issues, it would be an unreasonable hardship and burden at that late date for the Treasury Department to determine, assess and collect further tax deficiencies under a strict retroactive application of the "double-tax" rule and expressly pro-

vided that this should not be done by the Treasury Department *after* the enactment of the Revenue Act of 1928. On the other hand, Congress directed that a taxpayer whose taxes for 1924 and prior years had previously been determined, assessed and paid, and who should seek a refund of same subsequent to May 29, 1928, should have the "double-tax" rule applied against him in computing the taxable income before such refund could be allowed. This was because no such hardship existed in the case of the taxpayer last mentioned, and the inequality thus ultimately resulting as between the two classes of taxpayers inside this special group was of relatively minor importance to the rights and burdens of all the taxpayers as a whole, if the Treasury Department had then been permitted or required to go back, reaudit all cases not closed by the bar of limitation and make refunds under retroactive application of the so-called "single-tax" rule.

Appellant's case falls within the group last mentioned, since all the taxes sought to be recovered here were determined, assessed and paid prior to the date of enactment of the Revenue Act of 1928. Its contention that a refund of taxes so paid is now allowable upon the basis of a recomputation of its income, upon the installment basis, but with the "single-tax" rule applied to income received during the "period of transition" is obviously without merit.

Appellant's position that no interest accrued prior to the date of enactment of the Revenue Act of 1926 (February 26, 1926), upon the tax deficiencies paid

for the years 1918 and 1919 is likewise untenable. These two deficiencies were determined and assessed and notice and demand were made for their payment more than five years prior to the enactment of the 1926 Act. Appellant by filing a bona fide claim for their abatement shortly after such assessment, notice and demand, immediately subjected itself to interest upon whatever portion of that claim for abatement was rejected when the Commissioner finally acted upon such claim at one-half of one per centum per annum under the express provisions of the Revenue Acts then in force. The fact that the Commissioner did not act finally and partially allow that claim in abatement until after the enactment of the Revenue Act of 1926 did not relieve appellant of the interest which had theretofore accrued on such deficiencies under prior existing laws relating to the assessment and collection of taxes (including penalties and interest) imposed by such earlier acts. It is likewise immaterial that the Commissioner's ultimate decision abating part of these two deficiency assessments resulted from a computation of the income under a different method from that which had been used when the deficiencies were assessed and first demanded for payment in 1920. The relief or exemption provisions of the 1926 Act, relied upon by appellant here, do not apply to tax deficiencies determined, actually assessed and demanded for payment prior to the date of enactment of that statute.

There is no reversible error involved here in connection with the District Court's Finding No. XLI

that a first and second notice and demand for payment were made upon appellant in December, 1920, as to the deficiency assessments of 1918 and 1919 taxes now in question. It is stipulated that these deficiency assessments were made in November, 1920. The Court's finding as to the notice and demand for their payment is amply supported by both oral and documentary evidence offered by the appellant at the hearing and showing appellant's admission in writing early in 1921 of the receipt of such notice and demand. Obviously, this Court cannot review a finding based upon appellant's own admissions of fact at the trial below; and appellant's request for a contrary finding of fact was properly refused. This renders it unnecessary to consider appellant's further assignment that the trial Court erred in admitting, over its objection, certain testimony of a Deputy Collector, which practically went no further than a more detailed corroboration of the admitted facts just mentioned.

ARGUMENT.

I.

WHERE APPELLANT, AN INSTALLMENT MERCHANT, CHANGED FROM THE ACCRUAL TO THE INSTALLMENT METHOD OF RETURNING ITS INCOME FOR THE YEARS 1918 TO 1921, INCLUSIVE, THE AMOUNTS ACTUALLY RECEIVED DURING THE TAXABLE YEARS ON ACCOUNT OF SALES MADE IN 1917 AND PRIOR YEARS SHOULD NOT BE EXCLUDED IN THE COMPUTATION OF THE TAXABLE INCOME.

a. Statutes and regulations prior to 1926.

Under the Sixteenth Amendment, Congress was empowered to tax "incomes, from whatever source derived". The word "incomes" as there used should be construed "in the ordinary sense" or as if it had been "used in common speech". *Eisner v. Macomber,* 252 U. S. 189, 204, 207. So construed, it means "gain derived from capital, from labor, or from both combined", provided it be understood to include profits gained through sale or conversion of capital assets. (*Ibid.* p. 207. See also, *Goodrich v. Edwards,* 255 U. S. 527, 535.) Taxes were levied upon incomes received or accrued during the four taxable years now in question within the constitutional definition of the word "incomes" just set forth. Section 213 (a), Revenue Acts of 1918 and 1921. (App. A, *infra.*)

Section 212 (b) of these same two Revenue Acts (App. A, *infra*) also requires that the net income "shall be computed upon the basis of the taxpayer's annual accounting period * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer * * *". Since appellant has consistently used the calendar year as its taxable year, it was required under the general language of

the statutes just mentioned to include in its return for each calendar year all items of income realized in that particular year under the method of accounting regularly used in its business. For the years prior to 1918, it had used the accrual basis. The other alternative method then recognized by the taxing statutes was that based upon actual cash receipts and disbursements during the taxable year. Under the accrual method, the income was computed upon the basis of liabilities to and against the taxpayer actually contracted for during the taxable year. Where a taxpayer was regularly engaged in selling merchandise on deferred installments extending over and beyond the taxable year, there was no objection to his using the accrual method if he chose to do so. However, if he insisted upon deferring the taxation of his income until it was actually realized instead of being accrued or contracted for, then difficulties immediately arose. *Willcuts v. Gradwohl,* 58 F. (2d) 587 (C. C. A. 8th), certiorari denied, 287 U. S. 637.

To meet this situation, it was provided in Article 42, Treasury Regulations 45, promulgated on April 17, 1919, under the Revenue Act of 1918 (App. A, *infra*), that installment merchants should have the option to use either the accrual or closed sale basis or the installment basis in reporting their income from installment contracts, provided that a consistent accounting practice be adopted by the taxpayer in this respect. These regulations prescribed that

> the income to be returned by the vendor will be that proportion *of each installment payment* which the gross profit to be realized when the

> property is paid for bears to the gross contract price. (Italics supplied.)

And further directed that

> Such income may be ascertained by taking that proportion of the *total payments received in the taxable year* from installment sales (*always including payments received* in the taxable year *on account of sales effected in earlier years* as well as those effected in the taxable year) * * *. (Italics supplied.)

Article 42 of amended Regulations 45, promulgated December 29, 1919 (App. A, *infra*) was to the same effect. Although the method of returning income prescribed here for cases involving a change by the taxpayer of his accounting basis has been called the "double-tax" rule, the validity of those original regulations has been consistently upheld by this Court and other tribunals.

> *Tull & Gibbs v. United States,* 48 F. (2d) 148 (C. C. A. 9th);
> *Willcuts v. Gradwohl, supra;*
> *Hoover-Bond Co. v. Denman,* 59 F. (2d) 909 (C. C. A. 6th), and
> *Brant Co. v. United States,* 40 F. (2d) 126 (C. Cls.), certiorari denied, 282 U. S. 888.

While these original regulations were in force, appellant elected on May 16, 1919, to change from the accrual basis by filing its income and profits tax return for the year 1918 on the installment sales basis (R. 32), but failed to comply with those regulations by omitting from that return, as well as an amended

return filed in May, 1920, an item of $122,953.10, representing proportionate installment profits realized from total collections of $262,888.81 received during the year 1918 on account of sales made in 1917 and prior years. (R. 32-33, 35.) Appellant's real objection here is that after the Commissioner had finally accepted returns made on the installment basis for the four years in controversy, it failed to escape from paying tax for 1918 on the above-mentioned item of $122,953.10, and taxes for 1919, 1920 and 1921 upon similar items.

On October 20, 1920, Article 42 of Regulations 45 was amended by Treasury Decision 3082 (App. A, *infra*), so as to substitute the so-called "single-tax" rule in the treatment of installment collections received during the "period of transition" by providing that

> In any case where * * * and a change is made to the installment plan of computing net income, *no part* of any installment payment received subsequently to the change, *representing income previously reported on account of such transaction, should be reported* as income for the year in which the installment payment is received, * * * (Italics supplied.)

And all subsequent regulations promulgated through the year 1925 were to the same effect. Article 42, Regulations 45 (1920 Ed.), promulgated January 28, 1921; Article 42, Regulations 62, and Article 42, Regulations 65. (App. A, *infra*.)

In 1925, the installment income regulations were held by the Board of Tax Appeals to be invalid and beyond the scope of administrative regulations.

B. B. Todd, Inc. v. Commissioner, 1 B.T.A. 762;

Blum's, Inc. v. Commissioner, 7 B.T.A. 737, 751.

b. Retroactive provisions and regulations under the Revenue Act of 1926.

As indicated by this Court in *Tull & Gibbs v. United States, supra,* and in *Hoover-Bond Co. v. Denman, supra,* the decision of the Board in the appeal of *B. B. Todd, Inc., supra,* and the confusion and uncertainty which followed, lead to the enactment of Sections 212 (d) and 1208 of the Revenue Act of 1926. (App. A, *infra.*) The former provides that under regulations prescribed by the Treasury Department persons regularly selling merchandise on the installment plan

> *may* return as income therefrom in any taxable year that proportion of the installment payments *actually received in that year* which the total profit realized or to be realized when the payment is completed, bears to the total contract price, * * * (Italics supplied.)

and the latter directs that this rule shall be applied retroactively in computing income under the prior Revenue Acts. In enacting this legislation, Congress was fully cognizant of the rulings of the Board of Tax Appeals holding the "single-tax" regulations of 1920 and subequent years invalid, and deliberately used

language intended to reinstate and retroactively validate the original 1919 regulations prescribing the "double-tax" rule to all cases like the present one.

S. Rep. 52, 69th Cong., 1st Sess., p. 19;
H. Rep. 356, 69th Cong., 1st Sess., pp. 32-33, 59;
Cong. Rec., 69th Cong., Vol. 67, Part 3, p. 3293.
(App. B, *infra.*)

Thereafter, on August 26, and 27, 1926, respectively, the Treasury Department issued Treasury Decision 3921, and promulgated Regulations 69, Article 42 (App. A, *infra*), giving that interpretation to these retroactive provisions of the Revenue Act of 1926. See also Regulations 74, Article 351. (App. A, *infra.*)

The correctness of that interpretation of the statute, and its constitutionality when so construed, as against the objection of double taxation, are now clearly settled beyond question in this circuit and elsewhere.

Tull & Gibbs v. United States, supra;
Willcuts v. Gradwohl, supra;
Brant Co. v. United States, supra.

In *Hoover-Bond Co. v. Denman, supra,* the Court aptly said on this whole subject (p. 910):

> The legislative history of this section and the interpretation of it by the Treasury Department, as well as the judicial construction of it, all indicate that its purpose was to require all installment payments made in the taxable year to be returned regardless of whether they were reflected in returns made in previous years on the accrual basis. * * * Concretely, section 212 (d) retroactively applied, required plaintiff, if it should elect to make the 1917 returns upon the install-

ment basis, to observe the double tax rule rather than the single tax rule.

This legislative policy was recognized and continued in the Revenue Act of 1928 and we find no merit in the contention that it contravenes article 1, sec. 9, cl. 4 of the Constitution. *Tennessee v. Whitworth,* 117 U. S. 129, 137; * * * *Hellmich v. Hellman,* 276 U. S. 233; * * * *Tull & Gibbs v. U. S., supra.*

c. Retroactive provisions of Revenue Act of 1928.

The obvious effect of Section 212 (d) of the Revenue Act of 1926, retroactively applied, was to upset returns made under the "single-tax" rule for the years prior to 1925 (*Blum's, Inc. v. Commissioner, supra*), and the result of that situation being brought to its attention and being carefully considered by Congress was the enactment of Sections 44 (a) and (c) and 705 (a)(1) and (2) of the Revenue Act of 1928. (App. A, *infra.*)

Hoover-Bond Co. v. Denman, supra;
Willcuts v. Gradwohl, supra;
House Document No. 139, pp. 12-13;
H. Conference Report No. 1882, pp. 24-25, and Cong. Rec., Vol. 69, Part 8, pp. 8697-8699, all 70th Cong., 1st Sess. (App. B, *infra.*)

Subdivision (a) of Section 44 of the Revenue Act of 1928 simply reenacted Section 212 (d) of the 1926 Act, while subdivision (c) thereof wrote the "double-tax" rule now in question into a taxing statute in plain, blunt language.

Section 705 makes retroactive provision for the group of taxpayers who changed from the accrual to the installment basis for any taxable year antedating 1925 by an original return filed prior to the date of the enactment of the Revenue Act of 1926 in a rather anomalous or unusual way. It prohibits relief against the "double-tax" rule in the case of the taxpayer who had paid his taxes prior to the enactment of the Revenue Act of 1928. On the other hand, it grants a measure of relief to the taxpayer who was unfortunate enough to be in the position of still being pursued for additional taxes by the Treasury Department or might be in danger of such pursuit at some future date by requiring that the single tax rule be used in computing his income before a deficiency could be determined, assessed or collected in his taxes for 1924 or earlier years subsequent to the enactment of the Revenue Act of 1928.

The 1918 and 1919 taxes in question here were assessed in an aggregate sum approximating $132,000.00 in 1920, on the accrual basis and under the Commissioner's determination that the appellant's books and records had not been so kept as to meet the requirements for returning income upon the installment basis. (R. 33, 38.) In 1927 when the Commissioner reconsidered and allowed the installment basis under the "double-tax" rule, those assessments were abated in part and then paid as to the balance in February, 1928. (R. 35-36; 38-41.) The 1920 and 1921 returns were filed on the installment basis under the "single-tax" rule (R. 42-44; 49); the Commissioner during the year 1927 determined deficiencies for those two years

through applying the "double-tax" rule (R. 45-46, 50-51); those deficiencies were assessed and paid as to the year 1920 on January 28 and February 28, 1928, respectively (R. 47-48), and were assessed and paid as to the year 1921 on September 3, 1927, and October 18, 1927, respectively. (R. 52.)

Since none of the tax payments now in question were made after the date of enactment of the Revenue Act of 1928 (May 29, 1928), Section 705 (a)(1) of that Act covers this case and precludes any recovery by appellant here upon the theory that the "single-tax" rule should be used in computing its income in order to arrive at the alleged overpayment of taxes. This was the legislative intent under Section 705 (a)(1), and the statute when so construed has been upheld as valid.

Hoover-Bond Co. v. Denman, supra;
Willcuts v. Gradwohl, supra.

Cf. also,

Standard Computing Scale Co. v. United States, 52 F. (2d) 1018 (C. Cls.).

Without undertaking to prolong unnecessarily the length of this brief by detailed discussion of all the authorities cited by appellant, we submit, in view of the overwhelming weight of the authorities as hereinbefore set forth, that the District Court ruled correctly in approving the Commissioner's computation of the taxable income, and merely mention a few of the cases cited by appellant.

The case of *Jacobs Bros. Co. v. Commissioner,* 50 F. (2d) 394 (C. C. A. 2d), was decided after the

effective date of the Revenue Act of 1928 or on June 8, 1931, and really involves the computation of invested capital as distinguished from the computation of income, where an installment merchant changes from the accrual to the installment basis of making his returns. The Court there (Op. p. 396) very properly recognized that under Section 705 of the Revenue Act of 1928 it could not at that time make or review a determination of deficiency to be thereafter assessed and collected from the taxpayer without giving the taxpayer the benefit of the "single-tax" rule in computing his income. That is clearly not the situation here.

Appellant cannot derive any real comfort out of the case of *Maus v. United States* (N. D. Ohio), unreported, but found in 15 A. F. T. R., p. 532. There, the Court merely rendered special findings of fact, conclusions of law, and judgment on March 8, 1928, or prior to the effective date of Section 705 of the Revenue Act of 1928, so it cannot apply in construing that statute. Whatever weight this case might otherwise have as an authority against the application of the "double-tax" rule is destroyed by the subsequent decision in the Sixth Circuit in *Hoover-Bond v. Denman, supra.*[2]

The case of *Redlick-Newman Co., Inc. v. McLaughlin* (N. D. Calif.), decided July 13, 1931, not reported, which is very freely cited by appellant, is similar to the present case only to the extent that the

2. Appellant's further contention (Br. 20-21) with respect to the *Maus* case, *supra*, is conclusively answered by the opinion of the Supreme Court in *Graham v. Goodcell*, 282 U. S. 409, at pages 423-424.

installment merchant changed his basis from the accrual to the installment method by original returns for the same four years involved here. That case really went off as one governed by Section 705 (a)(2) instead of 705 (a)(1) of the Revenue Act of 1928, if we may speculate merely from the pleadings and judgment, without opinion, upon the reasoning of the District Court there. That taxpayer had appeals pending before the Board of Tax Appeals respecting deficiencies asserted for the taxable years 1918 to 1921, inclusive, when Sections 212(d) and 1208 of the Revenue Act of 1926 became effective. The Board rendered its decision October 20, 1927, reversing the Commissioner's determination that the taxpayer was not entitled to use the installment basis under the books and records kept by it, but directing under the 1926 retroactive legislation that the "double-tax" rule be applied when the income should be computed on the installment basis, and further directing settlement and final disposition of the case under its Rule 50. That order of redetermination was entered by the Board January 31, 1928, but did not become final so as to preclude the taxpayer's right of appeal therefrom to this Court until July 31, 1928. In the meantime, Section 705 of the Revenue Act of 1928 had become effective on May 29, 1928. After the time for appeal had expired without the taxpayer appealing to this Court, the Commissioner assessed the deficiency August 18, 1928, in conformity with the Board's final order of redetermination, and the tax there in question was paid on September 4, 1928. This statement of the facts as taken from the decision of the Board

(8 B. T. A. 719) and the record of the District Court in that case is obviously enough to show that it is clearly distinguishable from the case at bar, because here every dollar of taxes now in dispute had been finally determined to be due, assessed and collected prior to the effective date of the Revenue Act of 1928.

Since the first question, relating to the merits of the tax, should be answered in the negative, the decision of the District Court respecting that phase of the case is correct and should be affirmed.

II.

INTEREST ACCRUED AT SIX PER CENTUM PER ANNUM BETWEEN DECEMBER 31, 1920, AND FEBRUARY 26, 1926, UPON THE 1918 AND 1919 TAX DEFICIENCIES, WHICH HAD BEEN ASSESSED AND DEMANDED FOR PAYMENT ON OR BEFORE THE FORMER DATE AND WERE PAID IN FEBRUARY, 1928.

On November 20, 1920, the Commissioner signed an assessment list in which was included deficiencies of tax and penalty against appellant totalling $97,442.63 for the year 1918, and $34,784.84 for the year 1919, or an aggregate sum of $132,227.47. (R. 34, 38.) First notice and demand for their payment was made upon appellant December 1, 1920, and second such notice and demand was made December 31, 1920. (R. 54.) On March 1, 1921, appellant filed a claim for abatement of these aggregate deficiencies of $132,227.47, protesting against the "notice and demand" theretofore received from former Collector Flynn. (R. 69, 71.) On January 29, 1925, a preliminary or

intermediate audit letter was sent by the Commissioner to appellant indicating a correct tax liability of $39,048.54, and an overassessment of $38,182.27 for the year 1918, under a recomputation of the income, and stating further that "the overassessment shown herein *will be made* the subject of a certificate of overassessment which will reach you in due course through the office of the Collector * * *". (R. 77-79.) However, the Commissioner did not act formally upon the claim for abatement as to either year at that time or until the year 1927. He then recomputed the income under a method that in material respects differed from the basis used in either of his previous compilations of the taxpayer's income, and determined that there were overassessments of tax and penalty aggregating $51,184.90 for 1918 (R. 35-36), and aggregating $30,238.86 for 1919. (R. 40-41.) A mere mathematical calculation here shows that the Commissioner had then determined that the claim for abatement in full of deficiency assessments for both years aggregating $132,227.47 should be allowed as to both years in the aggregate sum of $81,423.76, and rejected as to the balance of $50,803.71 (R. 82), this last figure representing net deficiencies of $47,042.51 for 1918, and of $4545.98 for 1919.

The Commissioner in due time carried this last determination into effect by signing on February 9, 1928, a schedule formally allowing certificates of overassessment of $51,184.90 for 1918, and of $30,238.86 for 1919, and rejecting appellant's claim for abatement as to the balance of the 1918 and 1919 deficiency assess-

ments then outstanding in the aggregate sum of $50,803.71. (R. 36, 41.) That balance was then paid on February 17, 1928, together with interest thereon from December 31, 1920, until the date of payment at six per centum per annum. (R. 36, 41, 53.)

It will thus be seen that the interest question now presented relates to deficiencies of income taxes for taxable years prior to the year 1921 where assessment, notice, and demand for payment were all made and a bona fide claim for abatement was filed by the taxpayer while the Revenue Acts of 1921 and 1924 were in effect, although the claims for abatement were not finally allowed in part and rejected as to the balance until after February 26, 1926, the date of enactment of the Revenue Act of 1926. Everything, except final action upon the claim for abatement, took place at a time when Federal taxpayers were freely accorded the privilege of protesting and filing claims for abatement of deficiency assessments of income taxes and obtaining further administrative consideration of their cases before being required to pay the disputed tax assessments. (Cf. *Graham v. Goodcell, supra,* also *Rock Island etc. R. R. v. United States,* 254 U. S. 141.) The interest chargeable to the taxpayer in such cases was expressly fixed by Section 250(e) of the Revenue Acts of 1918 and 1921, respectively (App. A, *infra*) at the "rate of 1 per centum per month upon such amount from the time it became due", where any such tax remained unpaid "after the date when it is due, and for ten days after notice and demand by the collector, * * *". This, however, was expressly made subject to the following proviso:

> That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum [the 5 per cent relates to a penalty not in question here] shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month.

The statute just quoted is certainly plain enough to establish conclusively that interest accrued at the rate of six per centum per annum upon income tax deficiency assessments during the period same were withheld from collection under bona fide claims submitted to and accepted by the Commissioner of Internal Revenue under the provisions of the 1918 and 1921 Acts.

Union Pac. R. Co. v. Bowers, 24 F. (2d) 788, 790 (C. C. A. 2d), certiorari denied, 278 U. S. 601;

Kentucky Jockey Club v. Lucas, 14 F. (2d) 539 (W. D. Ky.);

Foss and Co. v. Nichols, 3 F. Supp. 371 (Mass.);

United States v. Maryland Casualty Co., 49 F. (2d) 556 (C. C. A. 7th), certiorari denied, 284 U. S. 645.

See, also,

Crown Willamette Paper Co. v. McLaughlin, 79 Fed. (2nd) 662 (C. C. A. 9th Cir.).

In order to avoid the rule announced in the above quoted statutes and decisions, appellant urges that the rule under Section 250(e) of the 1918 and 1921 Revenue Acts was superseded by virtue of certain sub-

divisions of Section 283 of the Revenue Act of 1926. We submit that this contention is without merit for the following reasons:

The provisions of the Revenue Acts of 1918 and 1921 relating to the computation of income taxes imposed under those Acts (including interest, penalties, or other statutory additions assessed as part of the tax), and the administrative provisions of those Acts relating to the collection of taxes actually assessed under same were not repealed but were expressly kept in effect when the Revenue Act of 1924 was enacted on June 2, 1924. (Cf. *Russell v. United States,* 278 U. S. 181.)

When the Board of Tax Appeals was created under the Revenue Act of 1924, and taxpayers were first given the privilege of appealing to that Board, the privilege of filing claims for abatement was then removed. However, in the enactment of the Revenue Act of 1926, it was provided under Section 283 (e) (App. A, *infra*) thereof that where a deficiency for an earlier year had been assessed but not fully paid before June 3, 1924, and the Commissioner made a final determination thereon after the enactment of the Revenue Act of 1926, the person liable for such tax deficiency was entitled to receive a notice thereof which would permit him to appeal to the Board of Tax Appeals. That provision, however, reads further as follows:

> In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of

> this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except * * *.

Section 283 (h) of the Revenue Act of 1926 (App. A, *infra*) directs that:

> In cases within the scope of subdivision (e), * * * in computing the amount which should be collected, interest upon the amount determined by the Commissioner, or * * *;

but imposes upon the foregoing direction a further specific proviso as follows:

> The interest provided in this subdivision shall be included only in cases where no other interest for the same period is provided by law.

So far as material here, the foregoing are the only provisions of the Revenue Act of 1926 relating to the rate of interest chargeable upon income tax deficiencies which were assessed and demanded and as to which claims for abatement were filed under Section 250 of the Revenue Acts of 1918 or 1921, respectively.

Since the administrative provisions of these earlier acts applicable to the collection of taxes both computed and assessed under same have been carried forward without any express repeal under the later revenue acts, it is obvious that the rate of interest

running only from and after the date of the enactment of the Revenue Act of 1926, under subdivisions (e) and (h) of Section 283 thereof, cannot apply here because this is not a case "where no other interest for the same period is provided by law".

This Court recently recognized the right of the Government to interest accruing at the rate of one-half of one per centum per month upon tax ultimately found to be due during the period in which a claim for abatement of an outstanding assessment was pending, and in which the taxpayer was being permitted to delay payment of such assessment, pending administrative consideration of its claim for abatement. In that case, the assessment was made with respect to pipe line taxes under the Revenue Act of 1918 and a very large amount of interest was at stake. (*Standard Oil Co. v. McLaughlin,* 67 F. (2d) 111 (C. C. A. 9th), certiorari denied, 292 U. S. 631, rehearing denied, 292 U. S. 605.)

If the disputed assessments had actually been made by the Commissioner after the enactment of the Revenue Act of 1926 with respect to the taxable years in question, no interest would be chargeable upon same except from and after the date of the enactment of that Act, by virtue of the express provisions of Section 283 (d) thereof (App. A, *infra*); but that is not the situation here under the admitted facts.

Congress has thus made specific provisions under the Revenue Act of 1926 for interest in cases where tax deficiencies for certain earlier years were made after the effective date of that Act, and has also made

provision for interest with respect to taxes assessed before but not paid until after the effective date of that Act "only in cases where no other interest for the same period is provided by law". By this latter distinction, Congress recognized that interest had already been provided by law in some cases where the assessments were made prior to June 3, 1924, and the claim for abatement thereof was acted upon after February 26, 1926. Under such circumstances, the rule applicable to interest is enforceable to the extent that it was already otherwise provided by law or at six per cent per annum during the entire period that the claim for abatement was under consideration.

See

Crown Willamette Paper Co. v. McLaughlin, supra,

where it was held that in a filing of a claim in abatement the interest rate at 6% was brought into operation without any demand from the collector.

None of the decisions cited by appellant (Br. 33, 35) as to the period for which appellant was chargeable with interest here support its contention as applied to Federal income taxes. In *Carney Coal Co. v. Commissioner,* 10 B. T. A. 1397, 1403, 1404, the Commissioner had timely assessed a deficiency for the taxable year 1919 on November 10, 1923. On November 23, 1923, he wired the Collector to file claim for abatement of such assessment as having been made prematurely and through error. The Collector did so, and the Commissioner allowed that claim in full in November, 1924, thereby wiping that assessment off the books as

effectively as if it had never been made. However, after the expiration of the statutory period within which a new assessment might have been made, the Commissioner undertook to reverse or rescind the abatement and to reinstate the November, 1923, assessment and proceed with the collection of the major portion of same. The Board's ruling (Op. p. 1404) that the subsequent attempted reversal or rescission "did not * * * operate to reinstate or revivify the assessment as of a prior date" does not apply to the situation here where the disputed assessments (to the extent they were paid) have never been abated up to the present time.

Appellant also says "the Government by its acts and vacillation over a long period of years has prevented the settlement of the taxes" continually changing its theory after the deficiency assessments were first made, finally admitting a large overassessment, and that "where the delay, not in payment but in ascertainment of the true theory and amount of tax liability, is occasioned by the Government, the Government is not entitled to interest". (Br. 34-35.)

The four decisions cited in this connection (Br. 35), all involve litigation in state Courts over various attempts by state taxing officials to assess and collect alleged delinquent property taxes omitted from any assessment at or near the original due dates of such taxes, and contested both as to the amount, situs or description of the property to be taxed as well as its value. Obviously, asserted penalty interest ranging under local statutes from twelve to twenty-five per

centum per annum was disallowed. The Courts held that the taxpayer should be relieved of interest in such cases because it was not permitted under local law to pay the conceded part of the tax and litigate the balance, and/or because voluntary payment of the tax in full would preclude a subsequent action to recover any illegal portion of same.

In *United States Trust Co. v. New Mexico,* 183 U. S. 535, 544-545, certain county officials filed a claim for delinquent ad valorem taxes in an equity receivership proceeding for foreclosure of a railroad after the receiver had actually delivered the properties to the purchaser under the foreclosure sale, and sought to enforce its payment, plus penalty interest, upon the new owners of the property. That assessment had been made in gross upon so many miles of right of way in that particular county without any more specific identification of the particular mileage subject to back assessment, although some of the mileage in that county was exempt under Federal land grants. The taxable mileage was not actually ascertained and specified until the decree was entered in the trial Court for the tax thereon without interest. The Court held (pp. 544-545) that until such designation of taxable property actually located within the limits of that particular county had actually been ascertained and so designated, it was inequitable to subject the purchasers of the railroad property to interest or penalties upon the tax then due thereon.

Since appellant, under the applicable Federal statutes, could have paid any part of the November, 1920,

assessment in question at any time, and thereby stopped interest on any conceded portion of such tax liability, but chose to file claim in abatement for the full amount thereof in the sum of about $132,000.00, under the privilege expressly afforded to it under Section 250 (e) of the 1918 and 1921 Acts, it is not in any position to complain now at being required to pay six per cent annual interest upon the sums representing the rejected portion of that claim for abatement. In other words, after availing itself of a statutory privilege of protest and further administrative hearing prior to payment of these assessments, it must bear the burden fixed by Congress as an incident to the enjoyment of such prividege. (Cf. *Graham v. Goodcell, supra.*)

Assuming the facts as found by the trial Court to be supported by substantial and uncontroverted evidence (which we show conclusively, as we believe, under the next question hereinafter), the ruling of the District Court that appellant was subject to six per centum annual interest accruing prior to February 26, 1926, upon the 1918 and 1919 taxes now in question, is correct and should be affirmed.

III.

THE FINDING OF THE DISTRICT COURT AS TO WHEN THE DISPUTED TAX DEFICIENCIES FOR THE YEARS 1918 AND 1919 WERE ASSESSED, AND WHEN THE FIRST AND SECOND NOTICE AND DEMAND FOR PAYMENT WERE MADE, IS SUPPORTED BY SUCH SUBSTANTIAL EVIDENCE AS TO BE BINDING AND CONCLUSIVE ON THIS COURT.

Finding No. XLI, which is the only finding not based upon the written agreed statement of fact (R. 107), reads as follows (R. 54):

> A first notice and demand for payment of the deficiency assessment of November, 1920 was made on December 1, 1920 by the defendant, Collector of Internal Revenue. A second notice and demand of the deficiency assessment made in November, 1920 was made on December 31, 1920 by the defendant, Collector of Internal Revenue.

The two deficiency assessments in question aggregating approximately $132,000.00, were both made by the Commissioner on November 20, 1920, and this fact was stipulated below. (R. 34, 38.) That notice and demand for the payment of those two deficiencies had actually been made by the Collector's office upon the appellant at some time prior to the middle of January, 1921, is established by the oral testimony and admission of Mr. Charles F. Thompson, a former officer and a witness for appellant, who stated as follows (R. 67):

> I recall a visit to the Collector of Internal Revenue in San Francisco in the early part of 1921; to the best of my recollection it was about the middle of January, 1921. I had a second interview with him about the latter part of February,

> 1921. The first interview was in his office in the Customs House in San Francisco. At the first interview I stated that we had received a notice and demand for an assessment of approximately $130,000. and we could not understand why we had received such a notice * * *.

If this admission is not enough to support the District Court's finding that notice and demand had been made for payment of these deficiencies in December, 1920, then we direct further attention to Defendant's Exhibit I, consisting of the claim in abatement for $132,227.47, filed on March 1, 1921. This was identified by the witness Thompson as having been so filed (R. 68), and contains, after the recitation of oral negotiations with the Collector's office and with the Bureau at Washington, the express admission that "the 'notice and demand' were accordingly issued without the Collector having been advised of the situation". (R. 69-71.)

While there is testimony from the Deputy Collector about endorsements in his own handwriting on the assessment lists in the Collector's office covering these two assessments and notices and demand for their payment sent out by him in 1920 covering same (R. 57-66), and while appellant's exception No. I was reserved to the admission of some of that oral testimony over its objection (R. 65), the admissions of appellant's witness Thompson and in appellant's own claim for abatement, as above indicated, are amply sufficient to sustain the District Court's finding in this respect without regard to whether the District Court properly or

improperly excluded evidence of the Deputy Collector to which appellant has reserved exceptions, and renders any further discussion of that phase of the case unnecessary here.

We do not deem it necessary to cite cases for the rule that the Appellate Court is bound by findings based upon substantial evidence where, as here, the challenged finding of fact is based primarily upon admissions of the appellant both in writing and through the oral testimony of its former officers, as above indicated.

Obviously, appellant's assignments challenging the District Court's finding of fact No. XLI, as being unsupported by the record, complaining as to the introduction of some oral testimony, which merely corroborated its own admissions at the hearing, and asserting error because the District Court refused to grant appellant's requested finding of fact to the contrary, are without merit in view of the foregoing circumstances, and the third question presented here must be resolved in the negative and against the appellant.

CONCLUSION.

The decision of the District Court is correct and should, therefore, be affirmed.

Dated, San Francisco, California,
April 6, 1936.

Respectfully submitted,

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(Appendices A and B Follow.)

(Appendices A and B Follow.)

Appendix A

Revenue Act of 1918, c. 18, 40 Stat. 1057:

Sec. 212. (b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. * * *

Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. *The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer,* unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period. (Italics supplied.)

Sec. 250. (e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided,* That as to any such amount which is the subject of *a bona fide claim for abatement* such sum of 5 per centum shall not be added and *the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month.* (Italics supplied.)

* * * * * * *

Sections 212 (b), 213 (a) and 250 (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227, are the same as corresponding sections of the 1918 Act, above quoted.

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 212. (d) Under regulations prescribed by the Commissioner, with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of *the installment payments actually received in that year* which the total profit realized or to be realized when the payment is completed, bears to the total contract price. * * * (Italics supplied.)

Sec. 283. (d) In the case of any *assessment made after* the enactment of this Act in respect *of a tax*

imposed by any Act of Congress prior to November 23, 1921, interest upon the tax proposed to be assessed shall be assessed at the same time as such tax, shall be paid upon notice and demand from the collector, and shall be collected as part of such tax, at the rate of 6 per centum per annum, from the date of the enactment of this Act to the date such tax is assessed, or, * * *. (Italics supplied.)

(e) *If any deficiency* in any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1918, * * * or by any such Act as amended, was assessed before June 3, 1924, *but* was *not paid in full before* the date of the enactment of this Act, and if the Commissioner, after *the enactment of this Act,* finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. *In the case of any such final determination the amount of the tax (whether deficiency or interest,* penalty, or other addition to the tax) *shall,* except as provided in subdivision (h) of this section, *be computed as if this Act had not been enacted,* but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except * * *.

* * * * * * *

(h) In cases within the scope of subdivision (e), * * * in computing the amount which should be collected, interest upon the amount determined by the Commissioner, or by the decision of the Board which has become final, to be the amount of the deficiency, shall be included at the rate of 6 per centum per annum from the date of the enactment of this Act up to the date of notice and demand from the collector, or, * * *. The interest provided in this subdivision shall be included *only in cases where no other interest* for the same period *is provided by law.* (Italics supplied.)

Installment Sales.

Sec. 1208. The provisions of subdivision (d) of section 212 shall be retroactively applied in computing income under the provisions of the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any of such Acts as amended. Any tax that has been paid under such Acts prior to the enactment of this Act if in excess of the tax imposed by such Acts as retroactively modified by this section, shall, subject to the statutory period of limitations properly applicable thereto, be credited or refunded to the taxpayer as provided in section 284.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 44. Installment Basis.

(a) *Dealers in personal property.*—Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the

installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price.

* * * * * * *

(c) *Change from accrual to installment basis.*—If a taxpayer entitled to the benefits of subsection (a) elects for any taxable year to report his net income on the installment basis, then in computing his income for the year of change or any subsequent year, amounts actually received during any such year on account of sales or other dispositions of property made in any prior year shall not be excluded.

Sec. 705. Installment Sales—Retroactive.

(a) If any taxpayer by an original return made prior to February 26, 1926, changed the method of reporting his net income for the taxable year 1924 or any prior taxable year to the installment basis, then, if his income for such year is properly to be computed on the installment basis—

(1) No refund or credit of income, war-profits, or excess-profits taxes for the year in respect of which the change is made or any subsequent year shall be made or allowed unless the taxpayer has overpaid his taxes for such year, computed by including, in computing income, amounts received during such year on account of sales or other dispositions of property made in any prior year; and

(2) No deficiency shall be determined or found in respect of any such taxes unless the taxpayer has

underpaid his taxes for such year, computed by excluding, in computing income, amounts received during such year on account of sales or other dispositions of property made in any year prior to the year in respect of which the change was made.

(b) Nothing in this section shall be construed as in any manner modifying sections 607, 608, 609, or 610 of this Act relating to the effect of the running of the statute of limitations.

Treasury Regulations and Decisions:

Regulations 45, promulgated April 17, 1919, under the Revenue Act of 1918:

Art. 42. *Sale of personal property on installment plan.*—Dealers in personal property ordinarily sell either for cash, or on the personal credit of the buyer, or on the installment plan. Occasionally a fourth type of sale is met with in which the buyer makes an initial payment of such a substantial nature (for example, a payment of more than 25 per cent) that the sale, though involving deferred payments, is not one on the installment plan. In sales on personal credit, and in the substantial payment type just mentioned, obligations of purchasers are to be regarded as the equivalent of cash, but a different rule applies to sales on the installment plan. Dealers in personal property who sell on the installment plan usually adopt one of our ways of protecting themselves in case of default: * * * The general purpose and effect being the same in all of these plans, it is desirable that a uniformly applicable rule be established. The rule

prescribed is that in the sale or contract for sale of personal property on the installment plan, whether or not title remains in the vendor until the property is fully paid for, the income to be returned by the vendor will be that proportion of each installment payment which the gross profit to be realized when the property is paid for bears to the gross contract price. Such income may be ascertained by taking that proportion of the total payments received in the taxable year from installment sales (always including payments received in the taxable year on account of sales effected in earlier years as well as those effected in the taxable year) which the gross profit to be realized on the total installment sales made during the taxable year bears to the gross contract price of all such sales made during the taxable year. Where a change is made to this method of computing net income the taxpayer's balance sheet should be adjusted conformably as of the date when the change is effected. If for any reason the vendee defaults in any of his installment payments and the vendor repossesses the property, the entire amount received on installment payments, less the profit already returned, will be income of the vendor for the year in which the property was repossessed, and the property repossessed must be included in the inventory at its original cost to himself, less proper allowance for damage and use, if any. If the vendor chooses as a matter of consistent practice to treat the obligations of purchasers as the equivalent of cash, such a course is permissible.

Article 42 of Regulations 45, with amendments, promulgated December 29, 1919, under the Revenue Act of 1918, is the same as the original regulation.[1]

Treasury Decision 3082, promulgated October 20, 1920, 3 Cumulative Bulletin 107:

* * * * * * *

Article 42 of Regulations No. 45 is hereby amended to read as follows:

Art. 42. *Sale of personal property on installment plan.*—Dealers in personal property ordinarily sell either for cash or on the personal credit of the buyer or on the installment plan.

* * * * * * *

(The part omitted here repeats without change the earlier regulation.)

* * * * * * *

Such income may be ascertained by taking as profit that proportion of the total cash collections received in the taxable year from installment sales (such collections being allocated to the year against the sales of which they apply), which the annual gross profit to be realized on the total installment sales made during each year bears to the gross contract price of all such sales made during that respective year. In any case where the gross profit to be realized on a sale or contract for sale of personal property has been reported as income for the year in which the trans-

3. These original regulations under the 1918 Revenue Act provided for the so-called "double-tax" rule in determining income realized after a change to the installment method of computation with respect to sales made prior to such change in accounting methods, which original regulations were approved in *Brant Co. v. United States*, 40 F. (2d) 126 (C. Cls.), certiorari denied, 282 U. S. 888; *Tull & Gibbs v. United States*, 48 F. (2d) 148 (C. C. A. 9th), and *Blum's, Inc. v. Commissioner*, 7 B. T. A. 737.

action occurred, and a change is made to the installment plan of computing net income, no part of any installment payment received subsequently to the change, representing income previously reported on account of such transaction, should be reported as income for the year in which the installment payment is received; the intent and purpose of this provision is that where the entire profit from installment sales has been included in gross income for the year in which the sale was made, no part of the installment payments received subsequently on account of such previous sales shall again be subject to tax for the year or years in which received. Where the taxpayer makes a change to this method of computing net income his balance sheet should be adjusted conformably * * * If the vendor chooses as a matter of consistent practice to treat the obligations of purchasers as the equivalent of cash, such a course is permissible.

Article 42 of Regulations 45 (1920 Edition), promulgated January 28, 1921, also under the Revenue Act of 1918, is substantially the same as Treasury Decision 3082.[2]

Article 42 of Regulations 62, promulgated under the Revenue Act of 1921, and Article 42 of Regulations 65, promulgated under the Revenue Act of 1924, are the same as Article 42 of Regulations 45 (1920 Edition), Treasury Decision 3082. 3 Cumulative Bulletin 107.

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2. These are the amended regulations undertaking to apply the so-called "single-tax" rule, which in 1925 were held by the Board of Tax Appeals to be invalid in *B. B. Todd, Inc. v. Commissioner*, 1 B. T. A. 762, and *Blum's, Inc. v. Commissioner*, 7 B. T. A. 737, 751-758.

Treasury Decision 3921, V-2 Cumulative Bulletin 24, promulgated August 27, 1926, under the Revenue Act of 1926:[3]

Article 42: *Sale of personal property on installment plan.*

* * * * * * *

Dealers in personal property ordinarily sell either for cash or on the personal credit of the purchaser or on the installment plan. Dealers who sell on the installment plan usually adopt one of four ways of protecting themselves in case of default:

* * * * * * *

(Part omitted substantially follows earlier regulations and is not in controversy here.)

* * * * * * *

The general purpose and effect being the same in all of these cases, the same rule is uniformly applicable. The rule prescribed is that a person who regularly sells or otherwise disposes of personal property on the installment plan, whether or not title remains in the vendor until the property is fully paid for, may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the total or gross profit (that is, sales less cost of goods sold) realized or to be realized when the property is paid for, bears to the total contract price. Thus the income of a dealer in personal property on the installment plan may be ascertained by taking as income

3. This amendment restored the so-called "double-tax" rule as originally promulgated in the April and December 1919 Editions of Regulations 45, Article 42. *Gradwohl v. Willcuts*, 58 F. (2d) 587 (C. C. A. 8th), and *Hoover-Bond Co. v. Denman*, 59 F. (2d) 509 (C. C. A. 6th).

that proportion of the total payments received in the taxable year from installment sales (such payments being allocated to the year against the sales of which they apply), which the total or gross profit realized or to be realized on the total installment sales made during each year bears to the total contract price of all such sales made during that respective year. No payments received in the taxable year shall be excluded in computing the amount of income to be returned on the ground that they were received under a sale the total profit from which was returned as income during a taxable year or years prior to the change by the taxpayer to the installment basis of returning income. * * *

* * * * * * *

If the vendor chooses as a matter of consistent practice to return the income from installment sales on the straight accrual or cash receipts and disbursements basis, such a course is permissible.

The foregoing provisions shall be retroactively applied in computing income from the sale of personal property under the Revenue Acts of 1916, 1917, 1918, 1921 and 1924, or any such Acts as amended. Any dealer in personal property on the installment plan whose books of account contain adequate information and were kept so that income can be accurately computed on the installment basis may file amended returns accordingly, and the excess amount of any tax previously paid over the tax as computed on the installment basis as herein provided shall, subject to

the statutory period of limitations properly applicable thereto, be credited or refunded.

* * * * * * *

Retroactive Application

The provisions of this Treasury decision shall be retroactively applied in computing income under the Revenue Acts of * * * 1921, and 1924, * * * in accordance with section 1208 of the Revenue Act of 1926.

All rulings inconsistent herewith are hereby revoked.

Article 42 of Regulations 69, promulgated August 28, 1926, under the Revenue Act of 1926, is the same as Treasury Decision 3921, V-2 Cumulative Bulletin 24.

Article 351 of Regulations 74, promulgated February 15, 1929, under the Revenue Act of 1928, is the same as Article 42, Regulations 69, except that the following was added by reason of Section 705 of the 1928 Act:

But in the case of any taxpayer who, by an original return, made prior to February 26, 1926, changed the method of reporting his net income for the taxable year 1924, or any prior taxable year to the installment basis. (See section 705.)

Treasury Decision 3251, 5 Cumulative Bulletin 245, promulgated November 25, 1921:

* * * * * * *

To Collectors of Internal Revenue and others concerned:

The validity of an assessment depends upon the law and actual facts existing. Therefore, an assessment made upon an erroneous theory or by mistake may not be remitted or abated because so made if, at the time its validity is passed upon, the Commissioner is in possession of evidence which shows an equivalent amount of tax is properly due in connection with the income, transaction, or matter upon which the assessment is predicated.

* * * * * * *

Appendix B

Reports of Congressional Committees. Revenue Act of 1926. S. Rep. 52, 69th Cong., 1st Sess., p. 19:

Installment Sales.

Section 212 (d). The revenue act of 1924 and prior acts have specifically provided two bases only for reporting income—first, cash receipts and disbursements, and, second, accrual. Since the enactment of the revenue act of 1921, however, section 202 (f) and its successors have impliedly recognized the existence of a third basis, the installment basis, without in anywise defining the situations and businesses to which such basis might be applied. The Commissioner of Internal Revenue has in his regulations provided, in pursuance of his authority to require a method of computation that will clearly reflect income, the installment basis for reporting income in certain cases. For instance, Regulations 65, as issued under the Revenue Act of 1924, provides that all dealers in personal property sold on the installment plan, * * *.

* * * * * * *

However, recent decisions of the Board of Tax Appeals (see *appeal of 650 West End Ave. Co., appeal of Manomet Cranberry Co.,* and *appeal of B. B. Todd (Inc.),* all decided during the past year) *have held that similar regulations under earlier acts were invalid and that the commissioner under the law could authorize no basis other than the cash receipts and disbursements basis or the accrual basis,* except for

certain minor departures. The committee amendment, in order to meet the situation resulting from the decisions, places the principles of the commissioner's regulations in the law and thereby validates the regulations for all periods after January 1, 1925. (Italics supplied.)

H. Rep. 356, 69th Cong., 1st Sess., pp. 32-33, 59:

Amendment No. 16. The Commissioner of Internal Revenue, in pursuance of his authority to accept and define the accounting methods which clearly reflect income, has for a number of years recognized the installment basis of accounting, but prior revenue acts have not defined the transactions or businesses to which the installment method of computing income might be applied. This amendment (now Section 212 (d) of the Revenue Act of 1926) writes into the bill of basic principles of the installment method authorized by prior regulations. It provides that under regulations prescribed by the commissioner with the approval of the Secretary a person who regularly sells or otherwise disposes of personal property on the installment plan may return in his income therefrom in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the payment is completed bears to the total contract price. * * *

* * * * * * *

If the taxpayer chooses, as a matter of settled practice, to treat an entire transaction as completed in the year in which the sale is made, it is intended that

he shall have a right to make a return for the whole profit realized or to be realized from the entire transaction as income for the year in which the sale is made; and the House recedes with a clarifying amendment.

* * * * * * *

Amendment No. 199. This amendment provides that the installment basis provided in subdivision (d) of section 212 shall be retroactively applied in computing income under the provisions of the revenue acts of 1916, 1917, 1918, 1921, and 1924. In the application of this provision *it is intended that the installment provisions of Regulations 45 promulgated on December 29, 1919, will be substantially followed in settling all cases under prior acts and under this bill;* and the House recedes. (Italics supplied.)

Revenue Act of 1928.

Report of the Joint Committee on Internal Revenue Taxation (House Document 139, 70th Cong., 1st Sess., pp. 12-13):

Installment Sales.

The present law provides that a taxpayer may report his income on the installment basis, at his option, and include in income the "proportion of the installment payments actually received in that year which the total profit realized or to be realized when the payment is completed bears to the total contract price". The regulations, based on the law and its legislative history, provide that in the period subsequent to the change from the accrual basis to the

installment basis, all installment payments must be included in income regardless of the fact that such payments may have been previously reported on the accrual basis and have been subjected to tax.

* * * * * * *

An investigation of the operation and effect of the installment-sales provisions has been made, since many objections have been raised by taxpayers, especially in regard to the features of alleged double taxation and * * *.

* * * * * * *

Whenever a change of method is made, one of two alternative courses must be adopted. If profits already reported are excluded, the tax in the year of change will be seriously subnormal. If the profit is not excluded there is a certain measure of double taxation, but so long as the business remains stable or increases the tax will still be less than if no change had been made. The burden is felt only where the business seriously declines or is abandoned. A provision which necessarily subjected taxpayers to double taxation would ordinarily be objectionable, but this objection does not seem to us to apply to an optional method which will probably not be adopted unless the advantage to the taxpayer offsets any incidental disadvantages. On the other hand, there is no substantial ground in equity for making the payment of a low rate of tax in a previous year a ground for permitting a taxpayer to return an altogether subnormal amount of income in a later high-tax year.

The double-taxation feature in the past has not, in our opinion, imposed any seriously unjust burden.

This conclusion is strongly supported by the fact that the original regulations embodied this feature, yet the option was freely availed of under those regulations. The adoption of the method has always been optional. The substance of the grievance of complaining taxpayers in regard to the past in reality seems to be that under amended regulations, for a time in force, other taxpayers of the same class received much more favorable treatment. It does not, however, seem that this inequity as between taxpayers in the same class should be remedied by a further concession to the class at the expense of the general body of taxpayers. Where, however, returns have been filed and accepted on the basis of regulations more favorable than the original regulations or the present law no additional tax should, in our opinion, now be assessed by reason of the subsequent change of regulations or law.

H. Conference Rep. No. 1882, 70th Cong., 1st Sess., pp. 24-25:

Amendment No. 215. The House bill contained no provision of retroactive application to taxpayers changing from the accrual to the installment basis for reporting income for tax purposes. The 1919 regulations of the Treasury prescribed in such cases the so-called double-tax rule. The 1920 regulations, however, abandoned this rule. In 1925 the Board of Tax Appeals held the 1920 regulations invalid, upon the ground that they did not accurately reflect the income of the taxpayer during the transition period. Section 1208 of the revenue act of 1926 was a compromise

provision writing into the law for the first time a statutory recognition of the installment basis, and adopting the double-tax rule of the 1919 regulations. In order to relieve taxpayers who have not yet paid the deficiencies resulting from the application of the double-tax rule (in accordance with section 1208) *the Senate amendment provides in such cases the amount of the deficiency will be computed in accordance with the single-tax rule; and inasmuch as the financial status of taxpayers who have already paid an amount sufficient to cover their tax liability when computed in accordance with the double-tax rule, will not be jeopardized, the Senate amendment provides that the double-tax rule shall be applied in computing the right to a refund or credit.* The Senate amendment was made applicable to any taxpayer who filed an original return or an amended return prior to the effective date of the revenue act of 1926, and the taxable year 1924 or any prior taxable year. (Italics supplied.)

Extracts from the Congressional Record. Revenue Act of 1926.

Proceeding in the Senate, February 4, 1926 (Cong. Rec., Vol. 67, Part 3, p. 3293):

Mr. Smoot. Now, Mr. President, I sent to the desk an amendment which I will say to the Senator from Michigan (Mr. Couzens) deals with the question of installment sales, making the provisions of section 212 retroactive.

* * * * * * *

Mr. Smoot. Mr. President, this amendment provides that the installment provisions recommended

by the Finance Committee, and found on pages 40 and 41 of the bill, shall be given retroactive application. Because of the confusion resulting from the recent installment decision of the Board of Tax Appeals, in the interest of certainty it is deemed advisable to provide that the installment provisions of subdivision (d) of section 212 of this bill shall be applied with retroactive effect.

Under the amendment, past transactions returned in accordance with the Treasury Regulations, to the extent that the regulations conform to the provisions of subdivision (d) of section 212 of this bill, cannot be reopened, despite the decision of the Board of Tax Appeals. *The committee intends that the installment provisions of Regulations 45, promulgated on December 29, 1919, will be substantially followed in settling all cases under prior acts under this provision.*

While the Committee believes that the 1919 Treasury installment regulations were a proper interpretation of the existing law in determining net income, because of the confusion now existing it is deemed advisable to make the amendment proposed in the interest of certainty. (Italics supplied.)

Revenue Act of 1928.

Discussion in the Senate, May 15, 1928, preceding the adoption of Section 705 (Cong. Rec., Vol. 69, Part 8, pp. 8697-8699):

Mr. Smoot. This refers to what is known as the "double-taxation" rule, applicable during the transition period in the case of a taxpayer changing from

the accrual to the installment method of returning income. This rule was embodied in the 1919 regulations of the Treasury. The 1920 regulations, however, abandoned the rule. Then, in 1925, the Board of Tax Appeals held the 1920 regulations invalid, because the taxpayer's income would not be properly reflected during the transition period. We are all convinced that the "double-tax" rule is sound, but we think that some relief should be granted to those who relied upon the 1920 regulations.

* * * * * * *

Mr. Simmons. We had a great deal of trouble handling that question in the committee, and it was the opinion of many of us that the original amendment proposed by the committee would result in double taxation. Neither the majority nor the minority desired to impose double taxes upon anybody, but there was some difficulty in framing an amendment which would accomplish the purpose desired, and we asked the experts to see if they could not exercise their ingenuity so as to provide against that contingency; and this amendment, I am advised by the actuary who sits by me here, he thinks does accomplish it, and I understand the Senator thinks so.

Mr. Smoot. *Yes;* that is the purpose, *so far as deficiencies are concerned.*

* * * * * * *

Mr. Dill. I want to ask the Senator whether this is retroactive or not?

Mr. Smoot. It is retroactive.

* * * * * * *

Mr. Reed of Pennsylvania. In every case in which the taxpayer changed, it is probable he did it because he thought he was going to get a diminution in his taxes.

Mr. Caraway. Did it have that effect?

Mr. Reed of Pennsylvania. In many cases it did.

* * * * * * *

Mr. Caraway. What does the amendment now accomplish?

Mr. Reed of Pennsylvania. The amendment substantially allows the status quo to remain.

* * * * * * *

Mr. Reed of Pennsylvania. Those who got the advantage keep it, but new men cannot come in and claim similar advantages, so that the system has to stop now.

* * * * * * *

Mr. Reed of Pennsylvania. The proposed amendment offered by the Senator from Utah means that the situation is to remain as it is; that if the taxpayer tries to get a refund he has to get it on the construction of the law which is most adverse to him, while if the Treasury chooses to pursue him, then that law which is most adverse to it will obtain. It is utterly indefensible logically.

Mr. Caraway. I think so myself.

Mr. Reed of Pennsylvania. And yet either of the other conclusions is indefensible.

Mr. Dill. What will happen if we do not include this provision?

Mr. Reed of Pennsylvania. Then we have to go to one alternative or the other. We have to say that

all the accounts have got to be opened up for a settlement on the accrual basis or else we have to make refunds to everybody who did not account on the installment plan. Both of those are wrong.

* * * * * * *

Mr. Reed of Missouri. Mr. President. I want to ask the Senator from Pennsylvania a question to see if I correctly understand him. I understand the Senator to say that if a claim for a refund was made by a taxpayer, the rule of construction to be adopted would be the one most strongly against the applicant.

Mr. Reed of Pennsylvania. That is correct.

Mr. Reed of Missouri. If the Treasury Department should undertake to collect the taxes, then the rule of construction would be most strongly against the Treasury.

Mr. Reed of Pennsylvania. That is correct. Logically that is indefensible, but what it amounts to in substance is saying that the taxpayers who in the past have filed their returns and paid their taxes on either of these regulations shall be allowed to rest at that. They shall not get any advantage by changing retroactively their method of accounting, nor shall the Treasury be heard to say, "What you did in the past was wrong". While that cannot be defended logically, it is a compromise, apparently satisfactory to the Treasury and to this group of taxpayers, between two alternatives, each of which seems indefensible. We cannot allow them to come back and file new amended returns on the basis that pays the lowest possible tax. That is not fair to the great mass of taxpayers who have paid their taxes and let

the thing lie. We cannot, on the other hand, in fairness override the regulations retroactively which were in force part of the time and say that the man who filed a return in the spring of 1921, under perfectly good regulations then in effect, shall be assessed an additional tax because he did everything that the law then seemed to require. Hence this compromise.

Mr. Reed of Missouri. *The effect of the compromise then, if I understand the Senator, would seem to be that if a man makes an application for a return of tax, the rule which was hardest against him will be applied.*

Mr. Reed of Pennsylvania. That is true.

Mr. Reed of Missouri. *While, if the Treasury makes application for additional taxes, the rule which was hardest against it will be applied. That would look like no one would get anything.*

Mr. Reed of Pennsylvania. That is what we hope will result. * * * (Italics supplied.)

* * * * * * *

No. 8077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACKSON FURNITURE COMPANY
(a corporation),

Appellant,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue,

Appellee.

REPLY BRIEF FOR APPELLANT.

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Appellee.

REPLY BRIEF FOR APPELLANT.

This reply brief is filed in an endeavor to clarify the questions presented, and to present to this Court arguments and authorities to show that ~~appellant's~~ appellee's contentions are not supported.

QUESTIONS PRESENTED.

We disagree with appellee as to the issues. Appellee in stating the "questions presented" omits many factors which we believe are vital to a fair presentation of these questions. Immediately following, these factors have been added to the questions and are indicated by being italicized.

We have also restated two questions (not mentioned by appellee) which we presented in our opening brief (questions 2 and 4a below) and these restated questions are also italicized.

We here revise ~~appellant's~~ appellee's definition of the questions presented so that they read as follows:

1. Where appellant changed from the accrual basis as of January 1, 1918 and *thereafter* made its returns of income on the installment basis, should amounts actually received by the appellant during the years 1918 to 1921 inclusive on account of installment sales made in prior years,—*upon which amounts the appellant had paid the full tax when he had theretofore (prior to January 1, 1918) returned said amounts as income,—be again taxed in the years 1918 to 1921 inclusive,—in the absence of the enactment of any revenue law so providing?*

2. *Must not Section 705 of the 1928 Revenue Act be interpreted either as a remedial statute, enacted to compose the condition of confusion brought about by inconsistent regulations of the Treasury Department and inconsistent decisions of the Treasury Department and the Courts, so as to afford relief both to taxpayers who had paid (under protest), and those who as yet had not paid, double taxes assessed on installment sales,—where such taxpayers had changed from the accrual to the installment basis for any taxable year antedating 1925 by an original return filed prior*

to the date of the enactment of the 1926 Revenue Act,

or

must not Section 705 be considered unconstitutional,—(leaving the law as it stood prior to its enactment),—if said section is to be interpreted as giving relief from double taxation to taxpayers who had refused or failed to pay these taxes when assessed, and as denying relief to taxpayers, (such as appellant) who had promptly paid (under protest) their said taxes when assessed,—particularly where, as here, the many years of delay in fixing the said taxes was due to the Government?

3. Is the appellant subject to interest accruing prior to February 26, 1926, with respect to alleged deficiencies in appellant's 1918 and 1919 income taxes *where an excessive assessment therefor was first made in 1920 and where final determination as to said assessment and first notice and demand for the payment of said tax was made in February, 1928 and prompt payment (under protest) was made by appellant within ten days after said notice,—where the claim of abatement filed in 1921 was filed under instructions of the appellee, to establish the fact of record that any 1920 notice with regard to said assessment was inadvertently and improperly given; where the appellant had been led to believe that any 1920 notice upon said assessment was regarded by appellee as improperly and inadvertently given; and where appellee, during the period between 1920 and 1928, had*

taken the following conflicting positions with regard to said alleged deficiencies: (a) That appellee had entirely abandoned its claim to said assessment; (b) that appellee had entirely abandoned the theory upon which said assessment was claimed; and that (c) (based upon an entirely different theory) appellee claimed only a portion of said assessment?

4. Is the finding of the District Court to the effect that a first notice and demand of the deficiency assessment of November, 1920, was made on December 1, 1920, and a second notice of said demand and said deficiency was made on December 31, 1920, supported by any substantial evidence?

(a) *Where appellee had instructed appellant to file a claim that said notice was inadvertently and improperly given, did not the District Court err in permitting a witness to give his opinion as to the contents of said notice, particularly where, as here, there was no showing that said notice had been lost or destroyed?*

STATEMENT.

In the interests of accuracy, appellee's statement must be modified. It is incomplete or inaccurate in the following particulars:

1. It fails to state that in making returns for the calendar years 1918 to 1921 inclusive upon the

installment basis, appellant included in taxable income for said years every part of its income, omitting only income accruing in prior years upon which it had previously paid its full tax. When it made its installment sales in 1916 to 1918 appellant was keeping its books upon the accrual basis and returned as taxable income the full purchase price for the said installment sales and paid taxes upon the said full purchase price, although collections therefor were not to be received and were not received until 1918 and subsequent years. Accordingly, in making its returns for 1918 to 1921 inclusive, it did not again include in taxable income any part of this purchase price, all of which it had previously returned and upon all of which it had previously paid its full income tax.

2. It contains incomplete and inaccurate statements with regard to the sending of notices in December, 1920 and in regard to the contents of and circumstances surrounding the filing of the claim of abatement on March 1, 1921. (Discussion of said inaccuracies is contained under topic II hereof.)

3. It fails to state that on January 29, 1925, appellee notified appellant to the effect that appellee abandoned its assessment claim, dated November, 1920, for the years 1918 and 1919. (R. 76-79.)

SUMMARY OF ARGUMENT.

The following summary of appellant's argument will perhaps serve to more clearly define the issues of this case.

Upon this taxpayer's right to recover the $77,127.51 deficiency imposed by the Government on the theory that the taxpayer should be doubly taxed, our argument is that prior to the enactment of the 1928 Revenue Act, there existed no provision of any statute which authorized the Government to double tax this taxpayer. In 1928 Section 44(c) of the 1928 Revenue Act plainly imposed double taxation but limited such double taxation to the future. Section 44(c), accordingly, could not affect this taxpayer's liability on its 1918-1921 taxes.

Double taxation is not to be *implied*. The statutory language upon which the Government now relies as implying double taxation—Section 212(d) of the 1926 Act—does not contain any implications of double taxation. Moreover, the wording of Section 44(a) (reenactment of said Section 212(d)) and of Section 44(c) of the 1928 Act, clearly indicates that no double taxation was ever either express or implied by Section 212(d) of the 1926 Act.

The 1926 regulations, attempting to impose double taxation without any basis of statutory authority, cannot be relied upon by the Government to justify double taxation of this taxpayer.

Nor is it the fact—as implied by appellee—that this taxpayer, not otherwise subject to double taxation, can be validly doubly-taxed under regulations promulgated

in 1926, merely for the reason that in 1918 this taxpayer was given a statutory option either to return on an accrual method or on an installment method, and thereupon chose to return on the installment method. The exercise by a taxpayer in 1918 of a statutory option does not constitute a justification for the imposition of added taxation, ten years later, upon the taxpayer's income upon which income said taxpayer had paid the full taxes prior to 1918. Were the law, as contended by appellee, a statute which would otherwise be declared illegal, arbitrary or unconstitutional, could be changed into legal, reasonable and constitutional legislation merely by the inclusion in such statute of an option. Obviously, the existence of an option in the statute cannot be used to force taxpayers to carry burdens otherwise lacking in statutory or lawful support.

In so far as concerns Section 705 of the 1928 Revenue Act, the Government admits that the interpretation for which it contends is both "unusual" and "anomalous".

On the other hand, appellant here supports a construction that is sensible and constitutional,—one that would afford relief alike to the taxpayer who, under Government compulsion, paid under protest on May 27, 1928, and to the taxpayer who resisted payment until May 28, 1928. The Government's "unusual" and "anomalous" interpretation imposes double taxation upon the taxpayer who paid his 1918-1921 taxes on May 27, 1928, but relieves from double taxation the taxpayer who resisted payment of the 1918-1921 taxes

until May 28, 1928. Federal tax-collecting would be destroyed if, as the Government interprets the statute, the taxpayer is rewarded (by merely being singly taxed) for dilatory tactics of nonpayment; whereas the taxpayer is penalized (by the imposition of double tax) for obedience to the Government's demand for payment of taxes.

The Government's interpretation not only is admittedly "unusual" and "anomalous", but calls for the Courts to give an unconstitutional construction to the section, in which it demands that as between two taxpayers similarly circumstanced, the paying taxpayer is doubly taxed, while its nonpaying competitor (such as Redlick-Newman Co.) is only singly taxed.

The Government apparently argues that because Section 705 was enacted to "compose" a situation of confusion, that the statute cannot be attacked because of its unconstitutionality. This reasoning is obviously fallacious. Unconstitutional, arbitrary or discriminatory legislation does not become less unconstitutional, arbitrary or discriminatory because it was enacted to "compose" confusion.

If the Government's interpretation of Section 705 is correct, then said section must be deemed unconstitutional and be disregarded, leaving the law as it stood before the enactment of said section—with no statutory requirement of double taxation.

If the Government is incorrect in its interpretation of Section 705, then under said section, appellant may recover the amount which it has overpaid the Government in double taxes and interest thereon.

This taxpayer recognizes that in order to sustain its arguments for the retention of the sum of $77,127.51 it must distinguish several cases which apparently hold contrary to its contention. However, on the issue of interest, the appellant believes that there is no such burden upon it, for the adjudicated cases support appellant's contentions.

The argument as to interest is given on the assumption that this Court may rule against appellant on the said item of $77,127.51. We believe the following argument with regard to interest is sound, irrespective of the validity of appellant's claim to said sum of $77,-127.51.

On the issue of interest, the taxpayer is entitled to the return of $15,682.43, collected for the period prior to February 26, 1926, and this taxpayer bases its right to the return of the said sum upon the provisions of Section 283(e) of the 1926 Revenue Act. Here (as appellee contends), the deficiency in appellant's income tax was imposed by the Revenue Act of 1918; was assessed in 1920 and paid on February 28, 1928. The Commissioner, on about February 9, 1928, finally determined the amount of the deficiency and on about February 17, 1928, sent by registered mail to appellant notice of such deficiency. Under these facts, Section 283(e) of the 1928 Revenue Act is applicable and not Section 250(e) of the 1918 Act.

Appellee endeavors to escape this conclusion by two arguments: 1st. That Section 250(e) of the 1918 Act is the applicable statute rather than Section 283(e) and (h) of the 1926 Act. It would appear that the

Government's argument in this regard is without merit and is directly contrary to the principles of law announced in the recent holding of this Court in *Crown Willamette Paper Company v. McLaughlin,* 79 Fed. (2d) 662.

Appellee contends that the instant case does not come within the provisions of said subdivisions of said section. The Government claims that valid notice of the 1918 and 1919 assessment on alleged deficiencies was sent to the taxpayer on December 1 and December 31, 1920. This second contention of the Government is unsupportable. The only notice of the 1920 assessment which the Government claims to have sent was inadvertently sent. This is established by the uncontradicted evidence in this case. There is no competent evidence showing that any notice referring to the said assessment was sent or what such notice contained. Incompetent opinion and secondary evidence of the contents of a document, which was neither lost nor destroyed, was admitted over objection. Disregarding such incompetent testimony, the only testimony in the record as to notice was that a notice was sent inadvertently; that the Government instructed the taxpayer not only to disregard this notice because it was inadvertently sent, but to establish of record, through the filing of a claim that the notice was sent by mistake and was to be disregarded; that the Government itself thereafter (in 1925) informed the taxpayer that this tax need not be paid and otherwise acted in a manner so that both the Government and the taxpayer understood that said notice, inadvertently sent, was to be totally ineffective. The Government also notified the

taxpayer that Section 283(e) of the 1926 statute was applicable. Accordingly, here, the taxpayer's abatement claim (filed under the Government's instruction) to establish the invalidity of the notice, cannot now be used by the Government to establish the validity of said notice.

From the foregoing, it appears that the District Court erred in admitting the incompetent evidence as to a document, neither lost nor destroyed, and in its finding with regard to the giving of notice in December 1 and 31, 1920, and in determining that interest was collectible for a period antedating February 26, 1926.

All the requirements of Sections 283(e) and (h) of the 1926 Act are here met and under the provisions of said sections, interest is only collectible for the period subsequent to February 26, 1926. If the equities are to be weighed in this matter, it seems clear that the Government, which has delayed nearly ten years in fixing the tax, during which period it made many conflicting decisions in regard thereto, and finally, in 1928, fastened a double taxation upon this taxpayer, should not be permitted to impose further "unusual" and "anomalous" burdens upon this taxpayer by requiring it to pay interest for a period prior to the date required by statute.

I.

THE FIRST STATUTORY ENACTMENT OF THE DOUBLE TAX RULE OCCURRED IN SECTION 44(c) OF THE 1928 REVENUE ACT, AND ACCORDINGLY THE IMPOSITION OF DOUBLE TAXATION UPON APPELLANT FOR THE YEARS 1918-21 WAS WITHOUT STATUTORY AUTHORITY.

a. Statutes and Regulations Prior to 1926.

On pages 19 to 23 of its brief, appellee reviews the situation as to statutes and regulations prior to 1926. This review establishes that before 1926, no statute purported to state a double tax rule—and that the double tax regulations of 1919 were amended in 1920, so that between 1920 and 1925, only single tax regulations prevailed. Furthermore, "in 1925 the installment income regulations were held * * * to be invalid and beyond the scope of administrative regulations". (Appellee's Brief, page 23.)

b. Statutory Provisions of, and Regulations Under, the 1926 Revenue Act.

On pages 23 to 25 of its brief, appellee reviews the situation as to the 1926 Act and regulations thereunder. This review establishes that the 1926 Act expressed no double tax rule. Appellee infers (page 23) that Section 212(d) of the Act *implied* a retroactive double tax rule. A mere reading of the section demonstrates that it contains neither an implication of retroactive effect nor an implication of double taxation.

Moreover, there are three conclusive answers to appellee's contention that a retroactive effect and double taxation are to be read into the wording of said Section 212(d).

1. (a) Retroactive effect is not implied through the use of vague indefinite language but must be clearly and plainly indicated.

(b) Double taxation is not to be implied. To be effective, it must be clearly and definitely stated.

Tennessee v. Whitworth, 117 U. S. 129, 137;
U. S. v. Supplee-Biddle Hardware Co., 265 U. S. 189, 196.

(In this connection, it must be noted that appellee itself admits that Section 44(a) of the 1928 Act (and necessarily Section 212(d) of the 1926 Act—of which said Section 44(a) is a mere reenactment) does not plainly set out any double tax rule. (See last paragraph, page 25, Appellee's Brief).)

2. The legislators intentionally omitted to incorporate in Section 212(d) the double tax rule which has been clearly stated in Article 42 of Regulations 45, but instead included only the part of said regulations which did *not* set up the double tax rule.

(Had the Congress intended to set up the double tax rule, it could have incorporated in Section 212(d) the following language of said regulation: "always including payments received in the taxable year on account of sales effected in earlier years as well as those effected in the taxable year". (See page vii App. A, Appellee's Brief.))

Had the Congress intended double taxation, "it would have been so easy for it to have said so". It had before it the clear language expressing double taxation and chose not to include it.

3. The action taken by the Congress in enacting Section 44(c) of the 1928 Revenue Act demonstrates that said Section 212(d) of the 1926 Act did not set up any retroactive double tax rule.

Section 44(a) of the 1928 Act merely reenacted Section 212(d) of the 1926 Act. Yet, as admitted by appellee (Appellee's Brief, page 25) the Congress added Section 44(c) to set up the double tax rule in "plain blunt language". If said Section 212(d) (identical with said Section 44(a)) already stated the double tax rule, what could be the purpose of the Congress *repeating* the double tax rule in the same section? Either Section 212(d) was so vague and indefinite that the Congress knew that it had not established the double tax rule—(the Congress being cognizant of the rule that valid double tax legislation cannot arise from inference but must be clearly stated)—or else the Congress knew, that said Section 212(d) (reenacted into said Section 44(a) did not set up any double tax rule whatsoever.

We believe that the conclusion cannot be escaped that Section 212(d) of the 1926 Act did not retroactively establish the double taxation.

If no retroactive double tax rule was established by statute, clearly no such rule could be established by mere *regulations,* which obviously must deal with *administrative* matters and not with creating substantive rights. (See Appellee's Brief, page 23.)

Turning from the statutes and regulations to the cases, it is found that appellee cites only two cases

which were decided under said Section 212(d). (The other two cases cited by appellee on page 21 of its brief, arise under Section 705 of the 1928 Act.)

We respectfully submit that neither of these cases should be followed in the case at bar. The first case—*Brant Co. v. U. S.*, 40 Fed. (2d) 126—was incorrectly decided: the Court arrived at an incorrect conclusion because it *assumed*—contrary to the fact—that Section 212(d) expressed the double-tax rule. (Later Federal cases have admitted that said section did *not* express the double-tax rule.) We have shown, in the preceding paragraphs, that said section contained no provision imposing double taxation.

The second case—*Tull & Gibbs v. U. S.*, 48 Fed. (2d) 148—is not in point because it does not deal with a taxpayer who filed an *original* installment return prior to 1926. In so far as its conclusions are based on the *Brant* case, it is necessarily in error.

We submit that appellee has failed to show any legislative retroactive double tax enactment prior to the 1928 Revenue Act and, accordingly, there is no statutory authorization for the imposition of the $77,127.51 of double tax against this appellant who paid its tax prior to the enactment of the 1928 Act.

c. Statutory Provisions of the 1928 Revenue Act.

Appellee can have small comfort from the provisions of the 1928 Revenue Act. The Congress deemed it necessary in subdivision (c) of Section 44 of said Act (to use appellee's own language) to write "the double tax rule now in question into a tax statute in plain

blunt language". (Appellee's Brief, page 25.) Clearly, if the double tax rule were already expressed in Section 44(a) (as appellee claims) there would be no reason for repeating it in Section 44(c).

The obvious effect of Section 44(c) of the 1928 Revenue Act, is to set up the double-tax rule to be applied *prospectively*. Section 44(c) clearly sets up said double-tax rule. However, Section 44(c) does not contain the appropriate language found elsewhere in the 1928 Act providing for retroactive application.

The conclusion is unescapable that said section 44(c) sets up the double-tax rule for the first time in an installment taxing statute but limits its application to the future.

Appellee cites no cases decided under said Section 44(c).

Section 705 of the 1928 Act was enacted to compose a situation caused by the confusion of Court decisions, regulations and the Government's practice in double taxing certain installment dealers.

On page 26 of its brief, appellee claims that said section rewards the "unfortunate" taxpayer who resisted paying double taxes until after its enactment by merely singly taxing such taxpayer, and punishes the "fortunate" taxpayer who paid his taxes a few days before its enactment by double taxing him.

It appears to this appellant,—who happens to be a taxpayer—that the Government has reversed its terms: appellant contends that the taxpayer is "fortunate" rather than "unfortunate" who is singly rather than doubly taxed.

Appellee concedes that the Government is contending for a construction of said Section 705 that is "unusual" and "anomalous". (Appellee's Brief, page 26.)

On the other hand, appellant argues for a construction that is both usable, sensible and constitutional—one that affords relief alike to the taxpayer who, under Government compulsion, paid (under protest) on February 27, 1928, and to one who resisted payment until May 29, 1928.

The Government's contention is "unusual" and "anomalous" in this: The Government contends for a construction of said section, whereunder the taxpayer who paid his 1918-1921 taxes on May 28, 1928, must be doubly taxed whereas the taxpayer who resisted payment of his 1918-1921 taxes until May 29, 1928, is to be only singly taxed. The Government argues for an interpretation which would destroy Federal tax-collecting,—in that it would reward the taxpayer (through single taxation) for his delaying tactics of nonpayment and at the same time penalize the paying taxpayer (by the imposition of double taxation upon him) for his obedience to the Government's demands that he pay his taxes.

The Government's interpretation not only is admittedly "unusual" and "anomalous", but would call for the Court to give an unconstitutional construction to this section,—in that, of two taxpayers, *similarly circumstanced,* this taxpayer is doubly taxed on its 1918-1921 installment receipts, while its nonpaying competitor (such as Redlick-Newman Co.) is only

singly taxed on its 1918-1921 installment income. (See *Redlick-Newman Co., Inc. v. McLaughlin* (Cal.), No. 18,693K—U. S. Dist. Ct.)

It has been suggested that said Section 705 is a "statute of limitations" and should be supported as such.

As a matter of fact, Section 705, as interpreted by the Government, is the reverse of a statute of limitations.

Statutes of limitations *punish* parties for their neglect by depriving them of the right to prosecute stale claims.

Campbell v. Haverhill, 155 U. S. 610, 617.

Section 705 (as interpreted by the Government) *rewards* parties for their neglect by conferring upon said parties the right to be only singly taxed if they have been neglectful enough to have failed to prosecute their stale demands to a conclusion by May 29, 1928.

On the other hand, said section (as interpreted by the Government) *punishes* parties for their promptness by imposing upon them double taxation if they shall have promptly (before May 29, 1928) paid the taxes assessed against them by the Government.

Statutes of limitation are constitutional because they are founded on sound policy. But, Section 705 (if it is to be interpreted as claimed by the Government) is lacking in sound policy in that it rewards neglect and injuriously affects collection of Federal taxes. Such interpretation would also be subject to attack on constitutional ground because it effects unreasonable discrimination.

Here, appellant has the right to assert the doubtful constitutionality of the Government's statutory construction because by such construction, through the process of drawing arbitrary distinctions, this taxpayer is over-taxed and its competitor under-taxed.

Iowa Des Moines National Bank v. Bennett, 284 U. S. 239, 247.

The statute, as construed by the Government, would be violative of the Fifth Amendment; and in attempting to again tax fully-returned and tax-paid items, the legislation would be violative of subdivisions 2 and 9 of Article I of the Constitution.

If the Government is correct in its interpretation, then Section 705 is unconstitutional and is to be disregarded, leaving the law as it stood before the enactment of said section: with no statutory requirement of double taxation.

If the Government is here incorrect in its interpretation, then this paying taxpayer, along with non-paying taxpayers in a similar position, is to be only singly taxed.

We respectfully ask this Court to support a reasonable interpretation of these sections of the 1928 Act: to reject appellee's interpretation of doubtful constitutionality and to follow the familiar rules of interpretation: that remedial statutes are to be broadly construed so as to afford the distressed taxpayers a remedy; that Revenue Acts are to be construed, wherever possible, in favor of the taxpayer; that Federal statutes are to be construed so as to avoid mischievous results and results destructive of Federal

administrative agencies; and that statutes are to be interpreted so as to avoid the visitation of hardship and injustice upon those who in good faith have complied with their requirements.

Appellee cites three cases in support of its interpretation of Section 705 of the 1928 Act:

Hoover Bond Co. v. Denman, 59 Fed. (2d) 909;
Willcuts v. Gradwohl, 58 Fed. (2d) 587;
Standard Computing Scale Co. v. U. S., 52 Fed. (2d) 1018.

The last cited case is not in point because it did not arise under Section 705. The first two cases are discussed on page 19 of our opening brief. In each of said two cases the Court came to an erroneous conclusion,—due, doubtless, to the fact that counsel failed to call to the Court's attention many of the valid objections, based on constitutional grounds, to the interpretation which the Court supported. It appears that the Court reasoned improperly,—in concluding that legislation otherwise to be regarded as discriminatory was to be regarded cured of such defect,—if such legislation could be designated legislation "of repose" or if earlier legislation gave the taxpayer the choice of following a different course. In our opening brief we have pointed out the fallacies in such reasoning. (Pages 15 and 19.)

We respectfully ask this Court that, instead of following the decision of said two cases, that it follow the reasoning of the Court in *Jacobs Bros. Co. v. Commissioner,* 50 Fed. (2d) 394 at 396 and *Maus v. U. S. District Court* (Ohio), No. 3207 Law, referred

to on pages 19 and 20 of our opening brief. We believe that neither of said cases have been overruled. The *Maus* case suggests a method of interpretation of Section 705, which is both constitutional and reasonable. The reasoning of the *Maus* case has not been answered (as suggested by appellee) in *Graham v. Goodcell,* 282 U. S. 409 at 423. The *Graham* case deals with ordinary statute provisions of limitations and concludes that they are binding upon the Courts as well as upon administrative officers.

On the other hand, in the instant case the Court is construing a statute relating to the right to make refunds to taxpayers and may reasonably construe the statute—so as to avoid an unconstitutional and unreasonable construction—as inhibiting the making of refunds by administrative officers but not binding the powers of the Courts.

We respectfully submit that an analysis of the applicable statute and of the cases shows that appellant has established its right to recover the entire $77,127.51.

II.

IN NO EVENT HAS THE GOVERNMENT ANY RIGHT TO RETAIN THE SUM OF $15,682.43 OF INTEREST.

Appellant claims the right to recover said sum of excessive interest collected by the Government, irrespective of whether appellant has the right to collect the principal sum here involved. Said sum of $15,682.43 is interest at the rate of 6% per annum upon the 1918-1919 tax deficiencies claimed by the

Government, for the period between December 31, 1920, and February 26, 1926. These deficiencies were assessed on November 20, 1920, and were not paid until February 27, 1928. The Commissioner finally determined the amount of said deficiencies in about February, 1928, and on February 18, 1928, sent, by registered mail, notice thereof to the taxpayer.

The facts of this case clearly indicate that the provisions of Sections 283(e) and 283(h) of the 1926 Revenue Act are here applicable. The said Section 283(e) provides that if any deficiency in any income tax imposed by the Revenue Act of 1928 was assessed before June 3, 1924—(here the assessment was in November, 1920)—but was not paid in full before February 26, 1926—(here the payment was on February 27, 1928) —if the Commissioner after February 26, 1926—(here in 1928)—finally determined the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax, notice of such deficiency.

Under the rule set out in said sections, the Government is not entitled to collect interest for any period prior to February 26, 1926.

Under the above stated facts, there can be no doubt that Sections 283(e) and 283(h) of the 1926 Act—rather than Section 250(e) of the 1918 or 1921 Acts —are applicable.

We believe that, under the doctrine of the case of *Crown Willamette Paper Co. v. McLaughlin,* 79 Fed. (2d) 266, interest is collectible upon the 1918 and 1919 assessments (which were finally determined in

February, 1928) only from the date of the enactment of the 1926 Revenue Act. We come to this conclusion because we believe it is established by said *Crown Willamette* case that Sections 283(e) and 283(h) of the 1926 Act will apply except where it is shown that a proper notice has been given by the Collector under prior Acts or that the taxpayer has filed a claim of abatement which establishes that such proper notice or demand has been given by the Collector under such prior Acts.

In the instant case, no proper notice or demand was served upon the taxpayer prior to the date of the enactment of the 1926 Act, and the only claim of abatement which was filed prior to said time established the *lack* of proper notice rather than the giving of proper notice. Accordingly, under the principles of said *Crown Willamette* case, Sections 283(e) and 283(h) of the 1926 Act apply and interest is collectible only from the date of the enactment of the said 1926 Act.

It is established in this case, *without contradiction,* that the first *unrevoked or proper* notice or demand for these 1918-1919 taxes here involved was served upon this taxpayer in about February, 1928.

Appellee claims (in effect) that when there is considered the competent evidence and testimony introduced in this case, there is substantial evidence establishing that proper notice and demand was given this taxpayer in 1920, and that the claim of abatement filed by the taxpayer in 1920 established that said proper notice and demand had been then given.

We respectfully urge that appellee is mistaken as to the effect of the competent testimony and evidence. They went no further than to show that the Government gave this taxpayer *some* kind of notice in 1920. What kind of a notice was sent was never proved. Moreover, the uncontradicted evidence shows that whatever notice was sent was sent by mistake; that the Government immediately instructed the taxpayer to disregard said notice and to establish of record (by filing a claim of abatement so stating) that said notice had been sent by mistake and was to be so regarded; that the taxpayer thereupon obeyed the Government's order to disregard said notice and to file said claim and thereupon filed the claim of abatement to establish the error of the Government; that the taxpayer, for the reason that no proper or effective notice or demand had been served upon the taxpayer until February, 1928, refrained from paying these taxes until such time; that the taxpayer, within ten days after it received the first valid notice and demand from the Government to pay said taxes, paid the same; that in the meantime the Government informed the taxpayer that it was proceeding under the provisions of Section 283(c) of the 1926 Act—the Act upon which the taxpayer claims is now controlling but which the Government now claims is not controlling.

So that this Court may be convinced that the effect of the uncontradicted evidence in this case is as above summarized, we have added to this brief "Appendix A", in which is included *all* the competent testimony and evidence dealing with the notice

claimed to have been given in 1920; the Government's instructions rendering such notice ineffective; and the Government's instructions to file the claim of abatement to establish its error in sending said notice, and the relevant portions of the claim of abatement.

Said evidence, *which is not contradicted,* establishes:

1. Where as here, the evidence went no further than to show that on December 11, 1920, a notice was mailed by the Government with regard to the 1918 and 1919 assessments,—*and there was no showing whatsoever as to the contents of said notice*—said evidence falls short of proving that the taxpayer was served with two notices and demands,—one on December 1, 1920, and one on December 31, 1920—in form and substance as required by law.

2. Where as here, the notice sent out was inadvertently sent out by the Government and the Government had ordered the taxpayer to disregard it for such reason, such notice must be deemed ineffective for all purposes.

3. Where as here, the Government relied upon the fact that such notice was ineffective, and, accordingly, notified the taxpayer that it was proceeding under Section 283(e) of the 1926 Act, the Government cannot now claim that said erroneously-sent notice was effective to defeat procedure under said section.

4. Where as here, the claim of abatement was filed by the taxpayer under instructions of the Government to establish the fact that any notice sent out in 1920 was inadvertently sent out and was ineffective,

the Government cannot now use said claim to prove that it had properly sent such notice to the taxpayer and that such notice was effective.

5. Where as here, the uncontradicted evidence shows that both the Government and the taxpayer agreed,—(as was the fact)—that the only notice mailed by the Government in regard to said 1918 and 1919 assessments, was sent out by mistake and further agreed that both the Government and the taxpayer would disregard said notice and that the said inadvertent sending of said notice and the consequent invalidity thereof would be established of record by the filing of a claim of abatement setting forth said erroneous sending of said notice, and the Government thereupon instructed the taxpayer to file said claim of abatement setting forth said erroneous mailing, which instructions were fulfilled by the taxpayer and the said parties by long course of conduct (for 8 years thereafter), and acted in all respects as if said notice had never been given and was invalid; then

(a) Said notice (which the parties had mutually agreed had been sent by mistake) is totally ineffective.

(b) The Government cannot claim validity of said erroneously-sent notice, which notice was disregarded by the parties under the Government's instructions, —both parties having acted for eight years on the basis that said notice sent in error was invalid.

(c) The Government cannot now use said claim of abatement to establish a set of facts which never existed—to show that a valid notice had been prop-

erly given by the Government—when as here, said claim of abatement was filed under Government instructions to establish of record the improper and inadvertent giving of notice, and where both parties acted for eight years on the basis that such notice was invalid and had not been properly given.

Ordinarily, a claim of abatement recites that the taxpayer has received proper notice of a tax and in such case obviously the filing of a claim of abatement (being an admission of the proper service of a proper notice) dispenses with the necessity of proving that proper notice had been properly given. In the case at bar, however,—(where a claim of abatement is filed at the Government's orders to establish that *no* proper notice had ever been properly given and that any notice given had been improperly and inadvertently sent) obviously, the claim of abatement cannot be used to prove that the proper statutory notice had been given.

It is significant that in this case, the Government, for a period of eight years after the filing of the claim of abatement, has acted with the knowledge that, and upon the basis that, any notice sent out in 1920 was ineffective.

The Government delayed over nine years after the assessment in fixing the amount of the tax. (R. 36, 82.) During this long period it made many conflicting interim determinations, varying as to amount and theory. In 1925 it notified the taxpayer that the entire 1918-1919 double tax assessment was incorrect. (R. 77.) It also notified the taxpayer that it was

proceeding under the provisions of Section 283(e) of the 1926 Act. (R. 90.) Finally, when it determined the amount of the tax, it did so on a theory entirely different from any theory theretofore maintained by it.

We submit that on the reasoning of the *Crown Willamette* case, here the claim of abatement establishes *lack of proper and legal notice* rather than the existence of proper or legal notice; establishes that by agreement any notice erroneously sent out in 1920 was to be disregarded by both parties and that the Government—having instructed the taxpayer to disregard said notice and to establish its validity, and having followed the course of conduct above outlined, cannot now be permitted to say that the claim of abatement established proper notice. (See *Walker v. U. S.*, 139 Fed. 409.)

In our previous brief we have shown that the Courts in adopting appellee's finding XLI must have relied upon incompetent secondary opinion testimony and that, accordingly, there was error both in the admission of said testimony and in the making of said finding. (See Appellant's Brief, pages 27 to 32.)

It is to be noted that appellee does not contend that the testimony to which we object was properly admitted. The gist of appellee's contention as to finding XLI is that it is supported by competent testimony and the claim of abatement.

We have shown above that appellee's contention in this regard cannot be supported and that there is no substantial evidence justifying finding XLI.

The only cases cited by the Government in support of its contention that Sections 283(e) and 283(h) of the 1926 Revenue Act are inapplicable are the following:

Union Pac. R. Co. v. Bowers, 24 F. (2d) 788, 790;

Kentucky Jockey Club v. Lucas, 14 F. (2d) 539;

Foss and Co. v. Nichols, 3 F. Supp. 371 (Mass.);

United States v. Maryland Casualty Co., 49 F. (2d) 556 (C. C. A. 7th);

Crown Willamette Paper Co. v. McLaughlin, 79 Fed. (2d) 662 (C. C. A. 9th Cir.).

The first four cases cited are not in point.

In the first three cases, the tax was paid long prior to the enactment of the 1926 Act and, accordingly, the provisions of Sections 283(e) and 283(h) of that Act were not involved. Moreover, the *Kentucky Jockey Club* case involved the question whether the 1918 Act or the 1921 Act was applicable in computing interest and is not helpful.

The fourth case involved a consent judgment entered against a taxpayer whereby the taxpayer consented to the imposition of interest. Moreover, in that case, the determination of the tax and demand were made prior to the enactment of the 1926 Act and, accordingly, said subdivisions (e) and (h) of Section 283 are inapplicable. We believe, however, that the case properly states the rules of law governing the construction of Revenue Acts.

The only case cited which has relevancy to the present situation is *Crown Willamette Paper Co. v. McLaughlin,* supra, and, as we have above shown that according to the reasoning of said case, subdivisions (e) and (h) of said Section 283 here apply.

We respectfully submit that the Government has totally failed to establish the inapplicability of Sections 283(e) and (h) of the 1926 Act, and that appellant has established its right to the return of the interest collected by the Government covering the period antedating the enactment of the 1926 Revenue Act.

In this reply brief, we have attempted to confine the discussion to answering, or commenting upon, the contentions of, and the authorities cited by, appellee. It will be noted that there are many arguments with relation to the issue of interest in appellant's brief (see Section D of our Opening Brief, particularly pages 33 to 38 thereof) which appellee has failed to answer.

We have this final observation with regard to the Government's claim for interest covering a period prior to the enactment of the 1926 Act: The Government is attempting to impose extra interest for a period several years prior to its final determination as to the amount or theory of the tax here involved. Moreover, the Government itself repudiated this tax during the period for which it now claims interest—only to finally determine, nearly ten years after the taxable years involved, to double tax this paying taxpayer and to single tax its nonpaying competitor.

Neither the statute nor the equities of the situation demand the imposition of such extra interest.

We believe that the appellant has established its right to recover the principal amount here involved. We are also convinced that,—irrespective of whether appellant is entitled to the principal amount,—appellant is entitled to recover the interest amounting to $15,682.43 collected for the period prior to February 26, 1926.

Dated, Oakland, California,
April 13, 1936.

Respectfully submitted,
HARRISON S. ROBINSON,
HARRY L. PRICE,
R. W. MACDONALD,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

TESTIMONY OF JOSEPH W. REICHLIN, FOR DEFENDANT.

Direct Examination.

The Court. Let me ask you: Have you any recollection of the sending out of *a notice* in this case?

A. Yes.

Q. You have a definite independent recollection?

A. Yes.

Q. Irrespective of any record you recall sending it out? A. Yes.

Q. Do you know the date that it was sent out?

A. Yes.

Q. You have in your own mind the date that it was sent out? A. Yes.

Q. Do you remember that without refreshing your memory by looking at that record?

A. I know this because of its being rather a big assessment, the little ones I would not recall, the larger ones I can remember.

Q. You have personal knowledge of it?

A. I cannot say the exact date without first referring to the date or month, but about the latter part of 1920, it is in my memory, without look- (42) ing at any books. (R. 60-61.)

The Court. Let us proceed.

Miss Phillips. Q. What sort of a record do you make, show me on this what is the record that you refer to of the date that it was sent out?

A. That is the record, right here.

Q. Show it to the Court and show it to counsel.

The Court. You remember that is the date upon which you sent it? A. Yes.

Q. What is the date? A. That was on 12/11/20.

Q. What does that mean?

A. That means December 11, 1920. (R. 62.)

Cross-Examination
by Mr. Macdonald.

In 1933 I sent out a little over 100,000 notices of demand to taxpayers to pay taxes. In 1932 I sent out approximately 37,000. In the year 1926 I sent out a notice and demand to Jackson Furniture Company. There are so many of them that I cannot name any other taxpayer to whom I sent a notice and demand in 1926. Certain cases I can remember. Whenever any case (44) is a big case it is impressed on my mind.

About six months ago when Mr. Price visited my office and asked me when a notice and demand, if any, was sent to the Jackson Furniture Company with regard to the 1918 and 1919 assessment, *I told him that I could not tell it without referring to my records.* I could not say the date. *We would not need books if we had that good a memory.*

I would have to look at my books to find out the date. That is what we have the books for. (R. 63-64.)

TESTIMONY OF CHARLES F. THOMPSON, FOR PLAINTIFF.

Direct Examination
by Mr. Macdonald.

I went to work for Jackson Furniture Company on February 7, 1907. During the period from 1920 up to and through the year 1928 I held the position of secretary of Jackson Furniture Company. I had the superintendency of the accounts of the books and the preparation of our income tax return.

I recall a visit to the Collector of Internal Revenue in San Francisco in the early part of 1921; to the best of my recollection it was about the middle of January, 1921. I had a second interview with him about the latter part of February, 1921. The first interview was in his office in the Customs House in San Francisco. At the first interview I stated that we had received a notice and demand for an assessment of approximately $130,000 and we could not understand why we had received such a notice for the reason that we had received from our attorney at Washington who had an appeal before the Income Tax Unit word that we had received a favorable decision regarding the assessment that had been made. *The Collector of Internal Revenue, to the best of my recollection, examined some memoranda and informed me that the notice and demand had been sent out by a clerk in the department in error and to disregard it.*

The second conversation with the Collector of Internal Revenue about the latter part of February, 1921, was held in the same office. In that second con-

versation I told Mr. Flynn, the Collector, that the result of our first interview had been referred to our attorney and auditors, and after a prolonged consul-
(48) tation they decided that it would be advisable for me to go to the Collector of Internal Revenue and ask him for a letter stating the facts as he had stated them to me. The Collector objected to doing that but he said that we should file a claim in abatement. He told me that the claim in abatement was to be filed at his, the Collector's request. He stated that in view of the fact that the decision of the income tax unit was of record in Washington; *that the notice of demand which we had received had been sent in error and to state that fact in our claim in abatement.* (R. 67-68.)

CLAIM OF ABATEMENT FILED MARCH 1, 1921.

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

Our returns for 1918 and 1919 were made in accordance with Article 42 Regulations 45 and subsequently a Revenue Agent visited our office, reviewed our records and found additional taxes due as above, taking the stand that we could not report under the Regulation referred to. We at once protested to the Department, were given an oral hearing on October 18, 1920, and the Department at once wholly reversed the finding of the agent. This appears of record in the Department and *the "notice and demand" were*

accordingly issued without the Collector having been advised of the situation. This matter was orally presented to Collector John L. Flynn on February 25, 1921, and this claim in abatement is filed pursuant to his instructions.

Signed:

Jackson Furniture Company,
By H. K. Jackson,
President.

Sworn to and subscribed before me this 28th day of February, 1921.

(Seal) S. Jackson,
Notary Public in and for the County of Alameda, State of California (51).

(R. 71.)

No. 8066

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

LAWRENCE V. LEWIS and EVELYN L. HORTON,

Appellants,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellee,

M. K. NANCE,

Defendant.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Solicitors.

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For Appellee:

LAWLER & DEGNAN, Esq.,
BRENTON L. METZLER, Esq.,

Standard Oil Building,

Los Angeles, California.

UNITED STATES OF AMERICA, ss.

To STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 3rd day of July, A. D. 1935, pursuant to Petition for appeal in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled STANDARD OIL COMPANY OF CALIFORNIA, a corporation, plaintiff, and M. K. NANCE, LAWRENCE V. LEWIS and EVELYN L. HORTON, defendants, numbered Eq. 57-C, wherein Lawrence V. Lewis and Evelyn L. Horton are appellants, and you are appellee to show cause, if any there be, why the judgment and/or decree in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Geo Cosgrave United States District Judge for the Southern District of California, this 3rd day of June, A. D. 1935, and of the Independence of the United States, the one hundred and fifty-ninth

Geo Cosgrave

U. S. District Judge for the Southern District of California.

[Endorsed]: Due service of the within Citation and receipt of a copy thereof, together with copy of the Assignment of Errors on this Appeal, is hereby acknowledged, this 4th day of June 1935. Lawler & Degnan by Brenton L. Metzler Attys for Appellee. Filed Jun. 12 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,	)	
Plaintiff,	)	No. Eq-57-C
vs.	)	
M. K. NANCE, LAWRENCE V. LEWIS and EVELYN L. HORTON,	)	BILL OF COMPLAINT (In Equity)
Defendants.	)	

Standard Oil Company of California, a corporation organized and existing under the laws of the State of Delaware, and being a citizen of said State of Delaware, and having an office at Wilmington, Newcastle County, Delaware, brings this, its bill of complaint, against M. K. Nance, Lawrence V. Lewis and Evelyn L. Horton, who are citizens of the State of California and who reside in Los Angeles County in said State, and complains and says:

I.

The ground upon which the jurisdiction of this court depends is diversity of citizenship between the parties hereto. The matter in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

II.

Plaintiff, Standard Oil Company of California, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, is a citizen of the State of Delaware and has an office at Wilmington, Newcastle County, Delaware.

III.

Defendants, M. K. Nance, Lawrence V. Lewis and Evelyn L. Horton, are citizens of the State of California and reside in Los Angeles County, California.

IV.

On and prior to March 1st, 1909, one Elias J. Baldwin was the owner in fee of all that certain real estate situate, lying and being in the County of Los Angeles, State of California, described as follows, to-wit:

Part of Lot Seventy-two (72) of Tract No. 701, as per map recorded in Book 16, page 110 of Maps, records of Los Angeles County, and part of the Rancho La Merced, described as a whole as follows:

Beginning at a point in the Northerly line of said Lot Seventy-two (72) at the intersection of the lines shown on said map as South 32° 07′ East 862.96 ft. and South 70° 52′ East 952.01 ft., said point of beginning being the Northeast corner of land conveyed by Anita M. Baldwin to Clara Baldwin Stocker by deed dated Sept. 27th. 1916, recorded in Book 6342, Page 165, filed for record Nov. 1st, 1916; thence along the Easterly line of land so conveyed to Clara Baldwin Stocker, South 41° 03′ West 452.8 ft., South 9° 29′ West 1143.87 feet; South 74° 42′ West 896.2 ft.; North 75° 26′ 20″ West 699.1 ft.; South 69° West 339 ft.; South 12° 29′ West 1113.50 ft.; South

77° 35′ West 836.84 ft.; North 79° 56′ 30″ West 550 feet; South 22° 26′ West 730 feet; South 50° 23′ West 304.4 feet and South 37° 32′ West 1212 feet to the Southwesterly Patent boundary line of said Rancho and the Southeast corner of land so conveyed to Clara Baldwin Stocker; thence along said patent line South 42° 41′ East 1480 feet to the most Westerly corner of land conveyed to Edwin G. Hart by deed recorded in Book 4937, Page 228 of Deeds; thence along the Northerly line of land so conveyed to Hart North 70° 52′ East 3330.64 feet and South 85° 52′ 40″ East 2733 feet to the Northeast corner of said land of Hart; thence along the Easterly line of said land South 26° 29′ East 638.42 feet to the Northerly line of the Extension of Lincoln Avenue; thence along the Northerly and Westerly lines of said avenue, North 62° 51′ 15″ East 728.27 feet; North 85° 58′ 30″ East 380.48 feet; North 64° 32′ 55″ East 356.60 feet; North 74° 59′ 30″ East 856.14 feet; North 78° 02′ 15″ East 329.73 feet; North 66° 56′ East 202.42 feet; North 34° 37′ 45″ East 53.44 feet; North 12° 45′ 15″ East 80.97 feet; North 18° 06′ 45″ East 216.43 feet; North 26° 02′ 15″ East 395.91 feet; North 18° 55′ 45″ East 96.95 feet and North 38° 21′ 30″ East 10.34 feet to the Southerly line of land conveyed to Walter P. Temple by deed recorded in Book 5193, Page 239 of Deeds; thence along the line of land so conveyed to Temple South 84° 38′ 10″ East 620.98 feet; thence North 07° 46′ East 150 feet to the beginning of a curve in the Southwesterly line of San Gabriel Boulevard 60 feet wide, said curve being concave to the Northeast and having a radius of 230 feet; thence Northwesterly along said curve 217.22 feet to the end of same; thence North 28° 07′ 15″ West 787.35 feet; thence North 41° 48′

West 925.86 feet to the most Northerly corner of the land so conveyed to Temple, on the Easterly line of said Lot 72 of Tract No. 701; thence along said Easterly line of said Lot 72, North 41° 48′ West 895.04 feet; thence Westerly along the Northerly line of said Lot 72 to the place of beginning.

V.

Said Elias J. Baldwin died in Los Angeles County, California, on March 1st, 1909, leaving a Last Will and Testament. By said Last Will and Testament H. A. Unruh was appointed executor thereof and was authorized and empowered as such executor to make sales of the real property belonging to Elias J. Baldwin's estate at public or private sale, and upon such terms and conditions and for such prices as to him, the said H. A. Unruh, should seem best. After the death of said Elias J. Baldwin said Last Will and Testament was duly filed in the office of the County Clerk of the County of Los Angeles, State of California, and thereafter upon proceedings for that purpose duly and regularly had and taken in the Superior Court of the County of Los Angeles, said Will was admitted to probate as the Last Will and Testament of said Elias J. Baldwin, deceased, and said H. A. Unruh was thereupon appointed executor thereof and qualified as such.

On or about the 18th day of September, 1912, said H. A. Unruh as such executor, under and by virtue of the power of sale set forth in said Will, in the County of Los Angeles, State of California, sold to Walter P. Temple, and Walter P. Temple became the purchaser of the whole of the real estate hereinafter described, for the sum of

Five Thousand Eight Hundred Thirteen and 30/100 Dollars ($5,813.30), said Walter P. Temple being the highest and best bidder at said sale. Thereafter the said Superior Court of the County of Los Angeles, State of California, upon due and legal return of the proceedings had under said power of sale in said Will contained, and upon due and legal notice given as required by law, did on September 30th, 1912, make an order confirming said sale and directing conveyance to be executed to said Walter P. Temple. Thereupon and under date of October 1st, 1912, said H. A. Unruh, as such executor of the Last Will and Testament of Elias J. Baldwin, deceased, made, executed and delivered to said Walter P. Temple a deed to said property, which property was and is more particularly described as follows, to-wit:

All those certain lots, pieces or parcels of land situate, lying and being in the County of Los Angeles, State of California, bounded and described as follows, to-wit:

That part of Lot Seventy-two (72), Tract #701, as per map recorded in Book 16, pages 110-111 of Maps, Records of Los Angeles County; beginning at the most Southeasterly corner of Lot 72, Tract #701, and running thence along the Southwesterly line of said Lot North 73° 31′ W. 1131.40 feet; thence N. 62° 32′ East 510.70 feet; thence North 48° 12′ East 100 feet, a little more or less to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East 836 feet a little more or less to beginning. Also that part of the Rancho La Merced, as per Patent recorded in Book 13, page 16 of Patents, Records of Los Angeles County. Beginning at the most Southeasterly corner of Lot 72, tract 701, as per map recorded in Book 16, pages 110-111

of Maps, Records of Los Angeles County and running thence South 41° 48′ East 89.86 feet; thence South 28° 07′ 15″ East 787.35 feet to the beginning of a curve concave to the Northeast and having a radius of 230 feet; thence along said curve 217.22 feet to the end of same; thence South 07° 46′ West 150 feet; thence North 84° 38′ 10″ West 1767.9 feet; thence South 76° 17′ West 740 feet; thence North 10° 43′ East 1225 feet; thence North 74° 55′ 50″ East 604.52 feet, a little more or less to the Southwesterly line of Tract #701, thence South 73° 31′ East 1131.4 feet to the point of beginning.

Subject to a right of way for poles or towers *up*-which to suspend cross-arms or brackeys wires for the transmission of electrical energy, as granted by Clara Baldwin Stocker and Anita Baldwin McClaughry to the Southern Californis Edison Company by Deed recorded in Book 4755, page 144 of Deeds, Records of Los Angeles County; excepting and reserving, however, for road purposes, a strip of land of a uniform width of forth (40) feet, immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land.

Said deed was duly acknowledged so as to entitle same to be recorded, and said deed was thereafter and on October 30th, 1912, recorded in Book 5193 of Deeds, page 239, Records of Los Angeles County, in the office of the County Recorder of said County.

A full, true and correct copy of said deed is attached hereto, made a part hereof and marked "Exhibit A".

VI.

Thereafter, and on or about August 11, 1915, by a written lease and agreement bearing that date, the said Walter P. Temple and his wife, Laura G. Temple, as party of the first part, for a valuable consideration, leased, let and demised unto J. M. Kent, as party of the second part, the sole and exclusive right to mine, dig, excavate, bore and drill for and otherwise develop and obtain the oil, gas, asphaltum and water, together with the right to sever, remove and take such substance from the lands constituting a part of the real property conveyed to said Walter P. Temple as in paragraph V alleged, situated in the County of Los Angeles, State of California, bounded and described as follows:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California; as per map recorded in Book 16, Pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot 72; thence along the Southwesterly line of said Lot North 73° 31′ West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North 62° 32′ East five hundred ten and seventy hundrdeths (510.70) feet; thence North 48° 12′ East, one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East, eight hundred thirty-six (836) feet, more or less, to beginning.

ALSO that part of the Rancho La Merced, in the County of Los Angeles, State of California; as per Patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most South Easterly corner of Lot Seventy-two (72), Tract No. 701, as per map recorded in Book 16, Pages 110 and 111 of Maps; thence south 41° 48′ East, eighty-nine and eighty-six hundredths (89.86) feet; thence South 28° 07′ 15″ East seven hundred eighty-seven and thirty-five hundredths (787.35) feet to the beginning of a curve concave to the North East and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet to the end of same; thence south 07° 46′ West one hundred fifty (150) feet; thence North 84° 38′ 10″ West seventeen hundred sixty-seven and nine tenths (1767.9) feet; thence South 76° 17′ West, seven hundred and forty (740) feet; thence North 10° 43′ East, twelve hundred twenty-five (1225) feet; thence North 74° 55′ 50″ East, six hundred four and fifty-two hundredths (604.52) feet: more or less, to the South Westerly line of Tract Number Seven Hundred One (701): thence South 73° 31′ East eleven hundred thirty-one and four tenths (1131.4) feet; to point of beginning.

EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land reserved for road purposes.

EXCEPTING THEREFROM the most South Easterly Two (2) acres of said Tract, being bounded on the

North by the San Gabriel Boulevard, on the South by that portion of the Southerly boundary line of said Tract extending Westerly from the South Easterly corner of the Tract to the proposed road hereinafter referred to, on the East by the boundary line of said Tract extending from the South Easterly corner thereof to the San Gabriel Boulevard and on the West by a proposed road to extend in a North Easterly direction from the Southerly boundary line of said tract to the said San Gabriel Boulevard, and to be located by the lessor herein on a line not more than One Hundred Seventy (170) feet West of a certain pumping plant now located on said two acres.

SUBJECT TO: 1. Right to construct and maintain a line of poles or towers over a strip of land 50 feet wide across the Rancho La Merced, as granted by Clara Baldwin Stocker and Anita Baldwin McClaughry, to Southern California Edison Company, a corporation, by deed recorded in Book 4755, Page 144 of Deeds.

2. A mortgage, executed by Walter P. Temple and Laura G. Temple, his wife, to secure a note for Thirty-eight Hundred Seventy-five Dollars (3875.00) dated October 2nd. 1912, due three (3) years after date, with interest at seven per cent (7%) per annum, payable semi-annually, in favor of H. A. Unruh, Executor, filed for record October 30th, 1912;

together with the right to enter into and upon said premises and to construct, use, maintain, erect, repair, replace and remove such buildings, structures and machinery as might be necessary in carrying on the business of mining and developing said property and the constructing, removing, repairing, replacing, maintaining, and using under,

along and throughout same, such pipe lines, telephone and telegraph lines and right of way for passage as might be needed in carrying on said business and mining operations for said premises, to have and to hold the said premises with the appurtenances unto said J. M. Kent for the full period of twenty-five years and so long thereafter as oil or gas or either of them should be produced in paying quantities thereon, unless otherwise forfeited by said J. M. Kent; and said J. M. Kent leased from said Walter P. Temple and Laura G. Temple the above described premises for the purpose and term aforesaid and upon the conditions and considerations set forth in said lease.

Said lease was duly executed and acknowledged by the parties thereto and was thereafter recorded on November 9, 1915, in Book 106, page 39, of Leases, Los Angeles County Records. Said lease is commonly known, and will be hereinafter referred to, as the "Temple lease". A full, true and correct copy of said Temple lease is attached hereto, made a part hereof and marked Exhibit "B".

The strip of land of a uniform width of forty (40) feet, immediately along and adjoining on the easterly and southeasterly side of the entire length of the westerly and northwesterly boundary line of the land described in said Temple lease, reserved for road purposes, will be hereinafter referred to as the "forty-foot strip."

VII.

Under date of April 4, 1916, by a written agreement executed by Walter P. Temple and his wife, Laura G. Temple, as parties of the first part, and J. M. Kent, as party of the second part, the original term of said Temple lease was extended for one year. Said extension agree-

ment was duly executed and acknowledged by the parties thereto and was thereafter recorded February 13, 1917, in Book 107, page 131, of Leases, Records of Los Angeles County.

VIII.

Thereafter, by a written assignment duly executed by J. M. Kent under date of November 6, 1916, and recorded November 28, 1916, in Book 104, page 333 of Leases, Records of Los Angeles County, California, said J. M. Kent sold, assigned, conveyed, transferred and delivered said Temple lease to Standard Oil Company, a California corporation, together with all the rights and privileges, incidents and appurtenances of the estate and interest in and to the said real property created by said lease and agreement or then used and enjoyed by said J. M. Kent in connection therewith, and in and to the oil, gas, asphaltum and water in and under such real property; and said J. M. Kent likewise, by said written agreement, sold, assigned, conveyed, transferred and delivered to said Standard Oil Company all his right, title and interest in, under or by virtue of that certain extension agreement described in paragraph VII.

IX.

Subsequently, by a written instrument duly executed under date of March 29, 1926, and recorded April 15, 1926, in Book 4543, page 382, Official Records of Los Angeles County, California, said Standard Oil Company, a California corporation, conveyed, transferred, assigned and set over to plaintiff, said Temple lease and said extension agreement and all its right, title and interest in, under or by virtue thereof, together with its right, title

and interest in and to the real property in said lease and hereinabove described and in and to the oil, gas, asphaltum and water therein and thereunder.

X.

Plaintiff is now, and has been at all times since March 29, 1926, the owner and in possession of said Temple lease and said leasehold estate and of all the rights and privileges, incidents and appurtenances of the estate and interest in and to the said real property created by said Temple lease and of the oil, gas, asphaltum and water therein and thereunder; and plaintiff is in possession of all of the premises in said lease described, and has been in such possession at all times since March 29, 1926. Plaintiff's assignor, Standard Oil Company, a California corporation, was the owner and in possession of said Temple lease and the leasehold estate thereby created, and was in possession of all of the premises in said lease described continuously from November 6, 1916, until plaintiff took possession thereof on March 29, 1926.

XI.

Plaintiff is now and for many years last past has been producing from the real property described in the Temple lease oil and gas in commercial paying quantities. Said leasehold estate and the right to produce oil, gas, asphaltum and water from the real property above described are of a value in excess of the sum of One Hundred Thousand Dollars ($100,000). Plaintiff and its predecessors in interest have complied with and fully performed all the obligations by it or them to be performed under the Temple lease and the extension agreement.

XII.

Plaintiff is informed and believes and upon such information and belief alleges that the defendants herein claim and assert some right, title or interest in the leasehold estate created by said Temple lease and/or in the premises therein described, or some part thereof, or in and to the oil and gas therein or thereunder, adverse to plaintiff; that the claims of said defendants and each and all of them are without any right whatsoever and that said defendants have not, nor have any of them, any estate, right, title or interest in said leasehold estate, or in the premises described in said Temple lease, or any part thereof, except such as may be subject to plaintiff's leasehold estate and except an easement for road purposes only over said forty foot strip.

FOR A FURTHER, SEPARATE AND SECOND CAUSE OF ACTION, PLAINTIFF ALLEGES:

I.

Plaintiff here refers to paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of its first cause of action hereinabove set forth and here incorporates the same by reference thereto the same as if each of said paragraphs were here set forth in full.

II.

In addition to the Temple lease described in the First Cause of Action plaintiff is the owner of an adjoining lease created by a certain written agreement dated October 9, 1916, between Anita M. Baldwin, as lessor, and Standard Oil Company, a California corporation, as lessee, whereby said Anita M. Baldwin, for a valuable consideration, did lease, let and demise to said Standard Oil Com-

pany certain land, hereinafter described, with the sole and exclusive right to the lessee to drill for, produce, extract and take oil, gas, asphaltum and other hydrocarbon substances and water from and store the same upon said land during the term of said lease, with the right to enter on said land at all times for said purposes and from time to time to construct, use, maintain, erect, repair, replace and remove thereon and therefrom all buildings, tanks, machinery, telephone and telegraph wires and other structures, including all pipe lines, which the lessee might desire in carrying on its business and mining operations on said premises, rights of way for passage over and upon and across, and ingress to and egress from said premises. The lands which were and are the subject of said lease are situated in the County of Los Angeles, State of California, and are more particularly described as follows:

Part of Lot Seventy-two (72) of Tract No. 701, as per map recorded in Book 16, page 110 of Maps, records of Los Angeles County, and part of the Rancho La Merced, described as a whole as follows:–

Beginning at a point in the Northerly line of said Lot Seventy-two (72) at the intersection of the lines shown on said map as South 32° 07′ East 862.96 ft. and South 70° 52′ East 952.01 ft., said point of beginning being the Northeast corner of land conveyed by Anita M. Baldwin to Clara Baldwin Stocker by deed dated Sept. 27th, 1916, recorded in Book 6342, Page 165, filed for record Nov. 1st, 1916; thence along the Easterly line of land so conveyed to Clara Baldwin Stocker, South 41° 03′ West 452.8 ft., South 9° 29′ West 1143.87 feet; South 74° 42′ West 896.2 ft; North 75° 26′ 20″ West 699.1 ft; South 69° West 339 ft; South 12° 29′ West 1113.50 ft; South

77° 35′ West 836.84 feet; North 79° 56′ 30″ West 550 feet; South 22° 26′ West 730 feet; South 50° 23′ West 304.4 feet and South 37° 32′ West 1212 feet to the Southwesterly Patent boundary line of said Rancho and the Southeast corner of land so conveyed to Clara Baldwin Stocker; thence along said patent line South 42° 41′ East 1480 feet to the most Westerly corner of land conveyed to Edwin G. Hart by deed recorded in Book 4937, Page 228 of Deeds; thence along the Northerly line of land so conveyed to Hart North 70° 52′ East 3330.64 feet and South 85° 52′ 40″ East 2733 feet to the Northeast corner of said land of Hart; thence along the Easterly line of said land South 26° 29′ East 638.42 feet to the Northerly line of the Extension of Lincoln Avenue; thence along the Northerly and Westerly lines of said avenue, North 62° 51′ 15″ East 728.27 feet; North 85° 58′ 30″ East 380.48 feet; North 64° 32′ 55″ East 356.60 feet; North 74° 59′ 30″ East 856.14 feet; North 78° 02′ 15″ East 329.73 feet; North 66° 56′ East 202.42 feet; North 34° 37′ 45″ East 53.44 feet; North 12° 45′ 15″ East 80.97 feet; North 18° 06′ 45″ East 216.43 feet; North 26° 02′ 15″ East 395.91 feet; North 18° 55′ 45″ East 96.95 feet and North 38° 21′ 30″ East 10.34 feet to the Southerly line of land conveyed to Walter P. Temple by deed recorded in Book 5193, Page 239 of Deeds; thence along the line of land so conveyed to Temple North 84° 38′ 10″ West 1146.92 feet to an angle in said line; thence still along said line South 76° 17′ West 740 feet; North 10° 43′ East 1225 feet; North 74° 55′ 50″ East 604.52 feet; North 62° 32′ East 510.70 feet and North 49° 12′ East 100 feet to the most Northerly corner of land so conveyed to Temple, on the Easterly line of said Lot seventy-two (72), of Tract

No. 701; thence along said Easterly line of Lot Seventy-two (72), North 41° 48′ West 895.04 feet; thence Westerly along the Northerly line of said Lot Seventy-two (72) to the Place of beginning.

Containing in said Lot Seventy-two (72) 124.866 acres, more or less and in the Rancho La Merced 587.407 acres more or less.

In said written agreement of lease it is provided that the lessee shall hold said premises, with the appurtenances, for a period of twenty years from the date thereof and so long thereafter as oil, gas, asphaltum or other hydrocarbons were produced in paying quantities thereon.

Said lease was duly executed and acknowledged by the parties thereto and was thereafter recorded November 15, 1916, in Book 106, page 165, of Leases, Los Angeles County Records. Said lease is commonly known as, and will be hereinafter referred to as, the "Baldwin lease."

III.

By a written indenture dated March 29, 1926, executed by Standard Oil Company, a California corporation, as party of the first part, and plaintiff, as party of the second part, said Standard Oil Company transferred, assigned, and set over to plaintiff, among other things, said Baldwin lease. Said written indenture whereby said Baldwin lease was so assigned to plaintiff was duly acknowledged and was thereafter and on April 15, 1926, recorded in Book 4543, page 382, of Official Records of Los Angeles County, California.

Plaintiff has been the owner of said Baldwin lease and in possession of the premises described therein, at all times since March 29, 1926. Plaintiff's assignor, Standard Oil

Company, a California corporation, was the owner of said Baldwin lease, and in possession of the premises described therein at all times from October 9, 1916, until the time plaintiff took possession thereof on March 29, 1926.

Plaintiff and its predecessors in interest have complied with and fully performed all the obligations by it or them to be performed under the said Baldwin lease.

IV.

Both the Baldwin and Temple leases are situated in the Montebello oil field in Los Angeles County, California. The Temple lease embraces approximately fifty-eight and five hundredths (58.05) acres and the Baldwin lease embraces approximately seven hundred twelve and two hundred seventy-three thousandths (712.273) acres. Except for the northeasterly boundary of the Temple lease, which borders upon San Gabriel Boulevard, and a portion of the south and southeasterly boundary of said Temple lease lying east of Lincoln Avenue, the lands embraced in said Temple lease are surrounded by the lands embraced in the Baldwin lease.

V.

The forty foot strip of land referred to in paragraph VI of plaintiff's first cause of action lies within and contiguous to the northwesterly and westerly boundaries of the Temple lease, and immediately adjacent to the Baldwin lease. Said strip commences at San Gabriel Boulevard at the northernmost point of the Temple lease and extends southwesterly and southerly within and along the said boundaries continuously for a distance of approximately twenty-four hundred forty and twenty-two hundredths (2440.22) feet to the most southwesterly point of said

Temple lease, where said strip terminates. Said strip contains an area of approximately two and twenty-two hundredths (2.22) acres.

VI.

Plaintiff has caused to be prepared a drawing of the Temple and Baldwin leases, which drawing correctly depicts the leased premises, said forty-foot strip, and the oil wells situated on said leases. A true and correct copy of said drawing is attached hereto, made a part hereof and marked Exhibit "C".

VII.

On the Temple lease seventeen (17) oil wells have been drilled by plaintiff or its predecessor in interest, all of which are capable of producing oil, gas and other hydrocarbon substances in commercially paying quantities, but which are under voluntary curtailment in accordance with the general economic policy of the oil industry now in force in the State of California. Of said wells, fourteen (14) thereof are now producing oil. Of the wells upon the Temple lease Temple No. 1 is within 242 feet of said forty foot strip, Temple No. 9 is within 230 feet of said strip, and Temple No. 10 is within 115 feet of said strip.

VIII.

On the Baldwin lease seventy-five (75) oil wells have been drilled by plaintiff or its predecessor in interest, sixty-six (66) of which are capable of producing oil, gas and other hydrocarbon substances in commercially paying quantities, but which are under voluntary curtailment in accordance with the general economic policy of the oil industry now in force in the State of California. Of said wells capable of producing oil, forty-nine (49) thereof are

now producing oil. Of the wells upon the Baldwin lease, Baldwin No. 5 is within 363 feet of said forty-foot strip, Baldwin No. 28 is within 318 feet of said strip, Baldwin No. 37 is within 155 feet of said strip, Baldwin No. 40 is within 402 feet of said strip, Baldwin No. 45 is within 375 feet of said strip, and Baldwin No. 47 is within 302 feet of said strip.

IX.

On or about May 29, 1933, defendants Lawrence V. Lewis and Evelyn L. Horton, as lessors, entered into a certain written indenture of lease with defendant M. K. Nance, as lessee, wherein and whereby said defendants Lewis and Horton purported to lease to defendant Nance all those certain pieces or parcels of land situate in the County of Los Angeles, State of California, and more particularly described as follows, to-wit:

That certain strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and Northwesterly boundary line of those two parcels of land described as follows, to-wit:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California, as per map recorded in Book 16, Pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot Seventy-two (72); thence along the Southwesterly line of said Lot, North seventy-three degrees (73°) thirty-one minutes (31′) West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North sixty-two de-

grees (62°) thirty-two minutes (32′) East five hundred ten and seventy-hundredths (510.70) feet; thence North forty-eight degrees (48°) twelve minutes (12′) East one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South forty-one degrees (41°) forty-eight minutes (48′) East eight hundred thirty-six (836) feet, more or less, to beginning.

Also that part of the Rancho La Merced, in said County and State, as per patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of Lot Seventy-two (72) of Tract Number Seven Hundred One (701) as per map recorded in Book 16, Pages 110 and 111 of Maps; thence South forty-one degrees (41°) forty-eight minutes (48′) East eighty-nine and eighty-six hundredths (89.86) feet; thence South twenty-eight degrees (28°) seven minutes (7′) fifteen seconds (15″) East, seven hundred eighty-seven and thirty-five hundredths (787.35) feet to the beginning of a curve concave to the Northeast and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet, to the end of same; thence South seven degrees (7°) forty-six minutes (46′) West one hundred fifty (150) feet; thence North eighty-four degrees (84°) thirty-eight minutes (38′) ten seconds (10″) West seventeen hundred sixty-seven and nine tenths (1767.9) feet; thence South seventy-six degrees (76°) seventeen minutes (17′) West seven hundred forty (740) feet; thence North ten degrees (10°) forty-three minutes (43′) East twelve hundred

twenty-five (1225) feet; thence North seventy-four degrees (74°) fifty-five minutes (55′) fifty seconds (50″) East six hundred four and fifty-two hundredths (604.52) feet, more or less, to the Southwesterly line of Tract Number Seven Hundred One (701); thence South seventy-three degrees (73°) thirty-one minutes (31′) East eleven hundred thirty-one and four tenths (1131.4) feet to the point of beginning;

for a period of twenty years from and after the date of said instrument and so long thereafter as oil or gas can be produced on the said premises in paying quantities. By said instrument said M. K. Nance was purported to be given the sole and exclusive right of prospecting the premises described in said instrument and drilling for and removing oil and gas therefrom and treating same and to establish and maintain on said premises such tanks, boilers, houses, engines, treating plants and other apparatus and equipment, power lines, pipe lines, road and other appurtenances which might be necessary or convenient in the operation of or production of oil or gas from said property. Said lease, hereinafter referred to as the "Nance lease", was recorded June 13, 1933, in Book 12185, page 183, of Official Records, Los Angeles County, California. A true and correct copy of said Nance lease is attached hereto, made a part hereof and marked Exhibit "D".

XI.

On or about August 26, 1933, defendants acting by and through their agents and servants entered upon said forty foot strip of land heretofore described, and by means of motor trucks deposited thereon certain sand, gravel, cement and water, together with tools and other apparatus

for the making of excavations and constructing concrete corner posts for an oil derrick. Defendants thereupon caused locations to be staked out for three oil wells upon said forty foot strip, and proceeded to and did pour concrete posts upon which to erect a derrick, and proceeded with the excavation of a cellar or pit over which to construct said oil derrick. Defendants are now engaged in the work of constructing or preparing to construct three oil derricks upon said forty foot strip with which to drill oil wells.

On July 1, 1933, and prior to the entry of defendants upon said forty foot strip, as aforesaid, plaintiff notified said defendants that plaintiff was the owner of said Temple lease, that defendants had no right, title or interest of any nature whatsoever in or to any oil, gas or other hydrocarbon substances in or under said forty foot strip; that plaintiff was lawfully in possession of said forty foot strip and intended to remain in possession thereof; that no one had the right to enter thereon without plaintiff's permission for other than agricultural or grazing purposes; and plaintiff thereupon warned defendants to refrain from entering upon said forty foot strip and from doing any act having for its purpose the removal of any oil, gas or other hydrocarbon substances in or under said strip.

Plaintiff first learned of defendants' entry upon said forty foot strip on August 26, 1933. On August 28, 1933, plaintiff through its attorneys notified defendant M. K. Nance that his entry upon said forty foot strip and the activities of his agents and servants thereon constituted a trespass; and plaintiff thereupon warned said defendant M. K. Nance to desist from further entry or

activity upon said premises. Said defendant M. K. Nance thereupon defied plaintiff and plaintiff's attorneys, and stated that he intended to and would proceed to drill an oil well upon said forty foot strip.

XII.

The oil producing horizons underlying the surface of said Temple and Baldwin leases are predominately sands of a coarse nature, which offer a minimum resistance to the movement of fluids. Oil wells upon these leases have a drainage area in excess of a four hundred (400) foot radius for each well. The wells now drilled upon said premises are sufficient to economically take the oil from the whole of said premises. Any new wells which might be drilled would take oil that may be produced from existing wells.

If wells are drilled upon said forty foot strip, such wells will drain oil from both the Temple and Baldwin leases within a distance of exceeding 380 feet from said forty foot strip.

XIII.

In the course of drilling oil wells a large amount of mud known as rotary mud is circulated in such wells, for the purpose of facilitating drilling operations. In drilling through the oil sands a large amount of such rotary mud is lost and finds its way into and through such sands. Should any wells be drilled upon said forty foot strip, there is grave danger of such rotary mud finding its way and traveling toward or into present producing wells upon

said Temple and Baldwin leases and thus ruining such producing wells.

XIV.

The surface of the land embraced in said Temple and Baldwin leases is largely covered with dry grass and brush, except where the land has been cleared for existing oil wells and improvements constructed thereon. In preparing to drill and/or in drilling oil wells upon said forty foot strip defendants will employ steam and/or gasoline power and will operate steam boilers and/or gasoline engines upon said premises, all of which will create a serious fire hazard and will jeopardize the safety of plaintiff's existing oil wells and improvements upon said Temple and Baldwin leases.

XV.

Purporting to act under the terms and provisions of said Nance lease, copy of which is attached hereto as Exhibit "C", defendants threaten to, and will unless enjoined by this Honorable Court, drill upon said forty foot strip embraced within said Temple lease at least three oil wells and in addition thereto such further and unlimited number of oil wells as said Nance may elect.

XVI.

By the oil wells which defendants threaten to drill said defendants will drain large and valuable amounts of oil, gas and other hydrocarbon substances from under the property described in the Temple lease and from under the property described in the Baldwin lease; and by such

drainage the value of plaintiff's leaseholds will be materially depreciated and the income and revenue derived by plaintiff therefrom will be materially decreased and plaintiff will suffer great and irreparable damage and injury for the redress of which plaintiff has no adequate remedy at law.

WHEREFORE plaintiff prays

(1) That defendants be required to set forth the nature of their claims in or to that certain leasehold estate created by said Temple lease, and that all adverse claims of the defendants thereto be determined by a decree of this court.

(2) That by said decree it be declared and adjudged that defendants have no estate or interest whatever in or to said leasehold estate, and that the title of plaintiff thereto is good and valid; that said leasehold estate owned by plaintiff embraces all of that certain forty-foot strip of land referred to in paragraph VI of plaintiff's foregoing first cause of action, subject only to an easement for road purposes; that defendants have no right to use said forty-foot strip or any part thereof for the purpose of exploring, prospecting, mining or drilling for or removing oil, gas or other hydrocarbon substances or to otherwise use, occupy, or obstruct any portion thereof in any manner whatsoever incidental thereto or connected therewith, or to use said strip for any other purpose or purposes than for road purposes.

(3) That defendants and each of them, their agents, servants and employees be permanently enjoined and restrained from using any portion of said forty-foot strip of land for the purpose of exploring, prospecting, mining, or drilling for, or removing oil, gas or other hydrocarbon substances and from otherwise using, occupying or obstructing any portion thereof in any manner whatsoever incidental to or connected therewith.

(4) That this Court make an order directing the defendants, and each of them, to show cause at a time and place appointed in such order why they and each of them shall not be enjoined and restrained during the pendency of said action from doing any of the acts and things above mentioned, and that a temporary restraining order be granted plaintiff herein enjoining and restraining said defendants and their agents, servants and employees, and each of them, until the hearing upon such order to show cause, from doing or causing to be done or continuing any of the acts or things above mentioned; that upon the hearing of said order to show cause a preliminary injunction be granted herein restraining said defendants from doing any of said acts during the pendency of the said action.

(5) That plaintiff be allowed its costs of suit herein incurred, and for such other and further relief as may be just and proper.

Lawler & Degnan
Attorneys for Plaintiff.

EXHIBIT "A"

DEED

This Indenture, Made the 1st day of October, 1912, at the City of Los Angeles, County of Los Angeles, State of California, by and between H. A. Unruh, the duly appointed, qualified and acting executor of the last will and testament of Elias J. Baldwin, deceased, late of the County of Los Angeles, State of California, the party of the first part, and Walter P. Temple, of the County of Los Angeles, State of California, the party of the second part, Witnesseth:

That Whereas, on the 4th day of November, 1908, the said Elias J. Baldwin, then in his lifetime, at the County of Los Angeles, State of California, made and executed his last will and testament, wherein and whereby he appointed said party of the first part executor thereof, and authorized and empowered the said party of the first part as such executor, to make sales of the real property belonging to his estate at public or private sale, and upon such terms and conditions, and for such prices as to him should seem best; and

Whereas, afterwards, to-wit: on the 1st day of March, 1909, the said Elias J. Baldwin died in the said County of Los Angeles, State of California, and thereafter his said will was duly filed in the office of the County Clerk of the County of Los Angeles, State of California, and thereafter, upon proceedings for that purpose duly and regularly had and taken in the Superior Court of the County of Los Angeles, State of California, the said will was duly admitted to probate as the last will and testament of said Elias J. Baldwin, deceased, and said H. A. Unruh,

the party of the first part herein, duly appointed executor thereof and thereafter duly qualified, and ever since has been and is now the duly appointed, qualified and acting executor of said last will and testament; and

Whereas, afterwards, to-wit: on or about the 18th day of September, 1912, the said executor, under and by virtue of said power of sale, at the said County of Los Angeles, State of California, sold to the said party of the second part, and said party of the second part became the purchaser of the whole of the real estate hereinafter particularly described for the sum of Five Thousand Eight Hundred Thirteen and 30/100 Dollars ($5,813.30) United States Gold Coin, he being the highest and best bidder and that being the highest and best sum bid; and

Whereas, the said Superior Court of the County of Los Angeles, State of California, upon the due and legal return of his proceedings under said power of sale, in said will contained, made by said party of the first part on the 18th day of September, 1912, after making the said sale, and upon due and legal notice of at least ten (10) days given as the law requires, did, on the 30th day of September, 1912, make an order confirming said sale and directing conveyance to be executed to the said party of the second part, a certified copy of which order of confirmation was recorded in the office of the County Recorder of said Los Angeles County, within which the said land sold is situate, on the 1st day of October 1912, which said order of confirmation now on file and of record in said Recorder's office is hereby referred to and made a part of this Indenture.

Now, Therefore, the said H. A. Unruh, as executor of the last will and testament of said Elias J. Baldwin, de-

ceased, as aforesaid, and in consideration of the sum of Five Thousand Eight Hundred Thirteen and 30/100 Dollars ($5,813.30) United States Gold Coin to him in hand paid by the said party of the second part, receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest and estate of the said Elias J. Baldwin, deceased, at the time of his death, and also all the right, title and interest of the said estate by operation of law, or otherwise, which may have been acquired other than or in addition to that of said testator at the time of his death, in and to all those certain lots, pieces or parcels of land situate, lying and being in the County of Los Angeles, State of California, bounded and described as follows, to-wit:

That part of Lot Seventy-two (72), Tract #701, as per map recorded in Book 16, pages 110-111 of Maps, Records of Los Angeles County; beginning at the most Southeasterly corner of Lot 72, Tract #701, and running thence along the Southwesterly line of said Lot North 73° 31′ W. 1131.40 feet; thence N. 62° 32′ East 510.70 feet; thence North 48° 12′ East 100 feet, a little more or less to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East 836 feet a little more or less to beginning. Also that part of the Rancho La Merced, as per Patent recorded in Book 13, page 16 of Patents, Records of Los Angeles County. Beginning at the most Southeasterly corner of Lot 72, tract 701, as per map recorded in Book 16, pages 110-111 of Maps, Records of Los Angeles County and running thence South 41° 48′ East 89.86 feet; thence South 28°

07′ 15″ East 787.35 feet to the beginning of a curve concave to the Northeast and having a radius of 230 feet; thence along said curve 217.22 feet to the end of same; thence South 07° 46′ West 150 feet; thence North 84° 38′ 10″ West 1767.9 feet; thence South 76° 17′ West 740 feet; thence North 10° 43′ East 1225 feet; thence North 74° 55′ 50″ East 604.52 feet, a little more or less to the Southwesterly line of Tract #701, thence South 73° 31′ East 1131.4 feet to the point of beginning.

Subject to a right of way for poles or towers *up*-which to suspend cross-arms or brackeys wires for the transmission of electrical energy, as granted by Clara Baldwin Stocker and Anita Baldwin McClaughry to the Southern Californis Edison Company by Deed recorded in Book 4755, page 144 of Deeds, Records of Los Angeles County; excepting and reserving, however, for road purposes, a strip of land of a uniform width of fort*h* (40) feet, immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land; and said grantee, for himself, his heirs and assigns in accepting this deed, agrees on demand to join with said grantor, his successors, or the owners for the time being, in dedicating to and for public highway purposes said strip of land so reserved.

Together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or in anywise appertaining.

To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs

and assigns forever. Subject to state and county taxes for the fiscal year 1912-1913.

In witness whereof, the said party of the first part, executor as aforesaid hath hereunto set his hand and seal the day and year first above written.

H. A. Unruh, (Seal)

Executor of the last will and testament of Elias J. Baldwin, Deceased.

State of California, County of Los Angeles) SS.

On this 1st day of October, in the year one thousand nine hundred and twelve, A. D. before me, L. R. Crumb, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared H. A. Unruh, the Executor of the last will and testament of Elias J. Baldwin, deceased, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same as such Executor.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(Notarial Seal) L. R. Crumb,

Notary Public in and for the County of Los Angeles, State of California.

My commission Expires July 19, 1915.

EXHIBIT "B"

THIS LEASE AND AGREEMENT, made and entered into this 11th day of August, 1915, by and between WALTER P. TEMPLE, and his wife, LAURA G. TEMPLE, of El Monte, California, party of the first part, and J. M. KENT, of Bakersfield, California, party of the second part.

WITNESSETH:

That, for and in consideration of the sum of fifty dollars ($50.), lawful money of the United States, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part, subject to the provisions hereinafter stated, does hereby lease, let and demise unto the said party of the second part, the sole and exclusive right to mine, dig, excavate, bore and drill for, and otherwise develop and obtain the oil, gas, asphaltum and water, together with the right to sever, remove and take such substance from the land situated in the County of Los Angeles, State of California, bounded and described as follows:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California; as per map recorded in Book 16, Pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot 72; thence along the Southwesterly line of said Lot

North 73° 31′ West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North 62° 32′ East Five hundred ten and seventy hundredths (510.70) feet; thence North 48° 12′ East, one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East, eight hundred thirty-six (836) feet, more or less, to beginning.

ALSO that part of the Rancho La Merced, in the County of Los Angeles, State of California; as per Patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most South Easterly corner of Lot Seventy-two (72), Tract No. 701, as per map recorded in Book 16, Pages 110 and 111 of Maps; thence South 41° 48′ East, eighty-nine and eighty-six hundredths (89.86) feet; thence South 28° 07′ 15″ East seven hundred eighty-seven and thirty-five hundredths (787.35) feet to the beginning of a curve concave to the North East and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet to the end of same; thence south 07° 46′ West one hundred fifty (150) feet; thence North 84° 38′ 10″ West seventeen hundred sixty-seven and nine tenths (1767.9) feet; thence South 76° 17′ West. Seven hundred and forty (740) feet; thence North 10° 43′ East, twelve hundred twenty-five (1225) feet; thence North 74° 55′ 50″ East, six hundred four and fifty-two hundredths (604.52) feet; more or less, to the South Westerly line of Tract Number Seven Hundred One (701); thence South 73° 31′ East eleven hundred thirty-one and four tenths (1131.4) feet; to point of beginning.

EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land, reserved for road purposes.

EXCEPTING THEREFROM the most South Easterly Two (2) acres of said Tract, being bounded on the North by the San Gabriel Boulevard, on the South by that portion of the Southerly boundary line of said Tract extending Westerly from the South Easterly corner of the Tract to the proposed road hereinafter referred to, on the East by the boundary line of said Tract extending from the South Easterly corner thereof to the San Gabriel Boulevard and on the West by a proposed road to extend in a North Easterly direction from the Southerly boundary line of said tract to the said San Gabriel Boulevard, and to be located by the lessor herein on a line not more than One Hundred Seventy (170) feet West of a certain pumping plant now located on said two acres.

SUBJECT TO:

1. Right to construct and maintain a line of poles or towers over a strip of land 50 feet wide across the Rancho La Merced, as granted by Clara Baldwin Stocker and Anita Baldwin McClaughry, to Southern California Edison Company, a corporation, by deed recorded in Book 4755, Page 144 of Deeds.

2. A mortgage, executed by Walter P. Temple and Laura G. Temple, his wife, to secure a note for Thirty-eight Hundred Seventy-Five Dollars (3875.00) dated October 2nd, 1912, due three (3) years after date, with

interest at seven per cent (7%) per annum, payable semi-annually, in favor of H. A. Unruh, Executor, filed for record October 30th, 1912.

TOGETHER also with the right hereby granted to enter into and upon said premises, and to construct, use, maintain, erect, repair, replace and remove such buildings, structures and machinery as may be necessary in carrying on the business of mining and developing said property, and the constructing, removing, repairing, replacing, maintaining and using, under, along and through the same, such pipe lines, telephone and telegraph lines, and right of way for passage as may be needed in carrying on said business and mining operations for said premises.

TO HAVE AND TO HOLD the said premises, with the appurtenances, as set forth, unto the said party of the second part, for the full period of twenty-five (25) years, and so long thereafter as oil or gas, or either or them, are produced in paying quantities thereon, unless otherwise forfeited by the said party of the second part. And the said party of the second part hereby leases, from the said party of the first part, the above described premises for the purpose aforesaid and for the term aforesaid, and upon the conditions and considerations as herein set forth.

Said first party hereby reserves the right to occupy and use said land, or to lease the same, or any part thereof, for agricultural or grazing purposes, subject to the rights of the second party herein named, which, for mining purposes shall be exclusive.

The second party agrees to commence the drilling of a well on said premises within six months from the date hereof, and prosecute the same with reasonable diligence

until oil is found in quantities deemed paying quantities by the second party or further drilling is unprofitable, or pay at the rate of Thirty Dollars ($30) in advance for each additional month, for a period not exceeding twelve additional months, until said well shall have been commenced or this contract surrendered as hereinafter provided.

The second party may, at any time, surrender this grant upon payment to the first party of Thirty Dollars ($30.), and any further sums due under the terms hereof to the first party, and thereafter shall be relieved of all further obligation hereunder, but such surrender shall be in writing.

If oil is found in paying quantities in first well drilled, second party agrees to commence the drilling of a second within three months after first well is completed and to continue drilling additional wells to be commenced successively in three months after completion of preceding well until five wells in all have been completed, or the second party shall forfeit all the land except ten acres for each completed well. In the event of a surrender of this lease as to the undrilled portion or part of said premises second party may, at its option, continue the possession of all producing or drilling wells, together with ten acres around each such well, subject to the provisions of this lease and so long as any of said wells are being drilled or operated by said second party.

The said party of the second part shall pay to the party of the first part, as royalty and rent for said premises, the one-eighth (1/8) part of all the oil, gas and asphaltum produced and saved therefrom, to be delivered to the party of the first part on the part of the land where produced

or saved; after deducting, however, all the water, oil or gas produced therefrom and used by the party of the second part in its operations thereon, which water, oil or gas may be so used without accounting to or paying said party of the first part therefor. The party of the first part shall be entitled to use, free of charge, any water developed by the party of the second part, and not used by the party of the second part for operations hereunder or in connection therewith.

Should the party of the first part elect to have the party of the second part purchase the one-eighth (1/8) part, rent or royalty aforesaid, then the said party of the second part, upon thirty (30) days' notice in writing from time to time of such election, hereby agrees to purchase, take and receive all of said one-eighth (1/8), and shall pay therefor the same price that others are being paid at the time by the party of the second part for mineral products of like character in the same vicinity, and such payments shall be made to the said party of the first part on the fifteenth day of each month, for all of said rent and royalty produced during the preceding calendar month, but if said royalty is taken in kind, the royalty oil shall be delivered as produced into tanks maintained on the land for that purpose, by the said party of the second part, and the same shall be stored in such tanks, free of charge to said party of the first part, for a period of thirty (30) days; and if gas is found and saved and sold by the second party, the second party agrees to pay one-eighth (1/8), the royalty aforesaid, of the proceeds received by it from the sale of such gas for use off the premises, but nothing herein contained shall obligate the second party to produce, save or sell gas from any well on said premises.

The rent and royalty aforesaid shall be ascertained, computed and paid monthly, and for the purposes of ascertaining the amount of and account thereof, the said party of the second part shall keep true and correct books of account showing the production of said substances, from the said premises, which account shall be open and free to the inspection of the said party of the first part, and said party of the second part shall furnish to said party of the first part written monthly statements of the production of said premises, for the preceding calendar month, and settlement thereof shall be made between the parties hereto on the fifteenth of each calendar month.

The said party of the second part shall pay all taxes that may be levied against the improvements, plants, machinery and the real and personal property, including oil and minerals belonging to the second party that may be stored on said premises, before the same become delinquent. The party of the second part agrees to operate and pump completed wells on the premises so long as said wells shall produce oil in paying quantities, and, between the parties hereto, a well on said premises shall be deemed to produce oil in paying quantities within the meaning of this agreement if it shall produce not less than one hundred (100) barrels a day of twenty-four (24) hours for at least thirty (30) successive days; provided, however, that the party of the second part may elect to consider a well as producing oil in paying quantities when the same produces less than one hundred (100) barrels per day of twenty-four (24) hours for thirty (30) consecutive days.

The said party of the first part shall have the right to examine at all times the said demised premises, and the work done, and in progress thereon, and the production

therefrom, and shall also have the right to inspect the books kept by the said party of the second part in relation to said property, to ascertain the production and amount sold and shipped therefrom; the said party of the second part shall give to said party of the first part due notice of all litigation involving the said premises, as soon as such litigation is known to said party of the second part, and it is hereby further provided that the said party of the second part shall have the right to remove from said premises all machinery, rigs, piping, casing, pumping stations, and other property and improvements belonging to, or furnished by, said party of the second part, except the first string of stove-pipe casing in the first well drilled, provided, however, that such removal shall be done without damage to said premises, or any drilling work that may be in progress thereon at the time, and that such removal shall be done before the termination, or within a reasonable length of time after the termination, of this lease.

That in the event the said party of the second part should fail to keep and perform each and all of the covenants and terms and conditions herein contained, by said party of the second part to be performed, then, in such event, all the rights of the said party of the second part hereunder shall, at the option of the said party of the first part, after the failure of the party of the second part to make good such default for thirty (30) days after written notice thereof to said party of the second part, unless such default be caused by, or arise out of, causes beyond the control of the party of the second part, cease and terminate and be of no further effect, and the said party of the second part shall thereupon, and on written demand

therefor made, redeliver the possession of said premises to said party of the first part, and thereupon the said party of the first part shall have the right to re-enter said premises and remove all persons therefrom.

That all the labor to be performed and material to be furnished in the operation hereunder, shall be at the cost and expense of the said party of the second part, and the said party of the first part shall not be chargeable with, nor liable for any part thereof, and that during the life of this lease, the said party of the second part shall keep the premises duly and fully protected against all liens of every character, and in the event of any lien being placed thereon to the knowledge of said party of the second part, he shall at once notify the said party of the first part thereof.

It is further understood and agreed, that the first party shall not in anywise, nor at any time during the currency of this lease, bore, mine, sink or drill any well or wells for the development and extraction of any oil, petroleum or other petroleum or hydrocarbon substances, or permit, cause or suffer any one to bore, sink, mine or drill any such well or wells for any such purposes upon the said two acres of land hereinbefore referred to as excepted from this lease.

And, in further consideration of this lease, it is agreed that, if the said first party shall at any time desire to sell or lease the said two acres of land or any part thereof, then he shall not lease or sell or cause, suffer or permit any one to lease or purchase the same without first giving the second party herein the sole, exclusive and prior right and option to lease or purchase said two acres of land

upon as favorable terms and conditions as any other bona fide lessee or purchaser might be willing to take or buy the same; but if any other person or persons should lease or buy said two acres, or any part thereof, then, and in that event, such purchaser or lessee shall take said land subject to the terms and conditions of this lease.

The party of the first part agrees to pay and discharge all taxes levied and assessed against the premises which are the subject of this lease, and the party of the second part agrees to pay all taxes levied and assessed during the life of this lease upon property installed by him upon said premises; and the parties hereto shall pay all taxes assessed against the mineral rights on said lands as follows: The party of the first part to pay one-eighth (1/8), and the party of the second part to pay seven-eighths (7/8), of said taxes.

It is further agreed that time is expressly made of the essence of this agreement.

It is mutually agreed by and between the parties hereto that all rights, terms, covenants, agreements, conditions and obligations herein contained shall be binding upon the said parties hereto and upon their representatives, heirs, administrators, successors and assigns.

IN WITNESS WHEREOF, the parties of this lease have to these presents set their hands and seals the day and year first above written.

(Signed) Walter P. Temple
(Signed) Laura G. Temple
(Signed) J. M. Kent

EXHIBIT "C"

(Map.)

EXHIBIT "D"

GAS AND OIL LEASE.

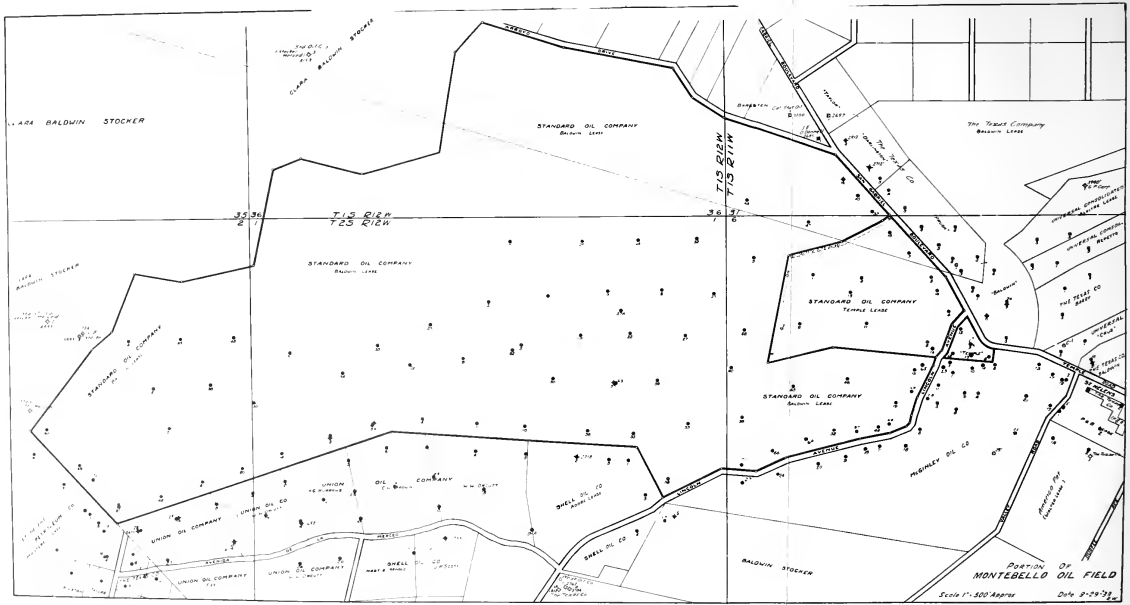
THIS INDENTURE OF LEASE, made and entered into this 29th day of May, 1933, by and between LAWRENCE V. LEWIS, and EVELYN L. HORTON, hereinafter called the Lessors, and M. K. NANCE, hereinafter called the Lessee,

WITNESSETH: that the Lessors, for and in consideration of Ten Dollars to them in hand paid, the receipt whereof is hereby acknowledged, lease to the Lessee all those certain pieces or parcels of land situate in the County of Los Angeles, State of California, and more particularly described as follows, to-wit:

That certain strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and Northwesterly boundary line of those two parcels of land described as follows, to-wit:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California, as per map recorded in Book 16, Pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot Seventy-two (72); thence along the Southwesterly line of


L. A. & A. BALDWIN STOCKER
CLARK BALDWIN STOCKER
STANDARD OIL COMPANY
Baldwin Lease
STANDARD OIL COMPANY
Temple Lease
STANDARD OIL COMPANY
Baldwin Lease
T 1 S R 12 W
T 2 S R 12 W
T 1 S R 11 W
T 2 S R 11 W
35
36
1
2
UNION OIL COMPANY
SHELL OIL CO
MAGNOLIA OIL CO
THE TEXAS COMPANY
Baldwin Lease
BALDWIN STOCKER
PORTION OF
MONTEBELLO OIL FIELD
Scale 1"-300' Approx
Date 3-29-38

said Lot, North seventy-three degrees (73°) thirty-one minutes (31′) West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North sixty-two degrees (62°) thirty-two minutes (32′) East five hundred ten and seventy-hundredths (510.70) feet; thence North forty-eight degrees (48°) twelve minutes (12′) East one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South forty-one degrees (41°) forty-eight minutes (48′) East eight hundred thirty-six (836) feet, more or less, to beginning.

Also that part of the Rancho La Merced, in said County and State, as per patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of Lot Seventy-two (72) of Tract Number Seven Hundred One (701) as per map recorded in Book 16, pages 110 and 111 of maps; thence South forty-one degrees (41°) forty-eight minutes (48′) East eighty-nine and eighty-six hundredths (89.86) feet; thence South twenty-eight degrees (28°) seven minutes (7′) fiften seconds (15″) East, seven hundred eighty-seven and thirty-five hundredths (787.35) feet to the beginning of a curve concave to the Northeast and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet, to the end of same; thence South seven degrees (7°) forty-six minutes (46′) West one hundred fifty (150) feet; thence North eighty-four degrees (84°) thirty-eight minutes (38′) ten seconds (10″) West seventeen hundred sixty-

seven and nine tenths (1767.9) feet; thence South seventy-six degrees (76°) seventeen minutes (17′) West seven hundred forty (740) feet; thence North ten degrees (10°) forty-three minutes (43′) East Twelve hundred twenty-five (1225) feet; thence North seventy-four degrees (74°) fifty-five minutes (55′) fifty seconds (50″) East six hundred four and fifty-two hundredths (604.52) feet, more or less, to the Southwesterly line of Tract Number Seven Hundred One (701); thence South seventy-three degrees (73°) thirty-one minutes (31′) East eleven hundred thirty-one and four tenths (1131.4) feet to the point of beginning.

Said lease shall be subject to and upon the following terms and conditions, to-wit:

1. Subject to all liens, terms, restrictions, rights, conditions and encumbrances as to title of record.

2. The lease shall continue for a period of twenty (20) years from and after the date hereof, and so long thereafter as oil or gas can be produced on the leased premises in paying quantities.

3. Lessee shall have the sole and exclusive right of prospecting demised premises and drilling for and removing oil and gas therefrom, and treating same, and to establish and maintain on said premises such tanks, boilers, houses, engines, treating plants, and other apparatus and equipment, power lines, pipe lines, roads and other appurtenances which may be necessary or convenient in the operation of or production of oil or gas from said property.

4. Lessee shall have the right, during the term of this lease, to drill for and develop such water on said premises as he may require in his operations.

5. The Lessee agrees to start the drilling of a well for oil within ninety (90) days from the date of this agreement, and to continue the work of drilling such well, after commencing the same, with due diligence until a depth of 6000 feet has been reached, unless oil is discovered in paying quantities at a lesser depth, or unless such formations are encountered at a lesser depth as will indicate to the geologist of the Lessee that further drilling would be unsuccessful. In the event of encountering mechanical difficulties in the prosecution of work, the Lessee may abandon the well, but this lease shall continue in full force if a new well is commenced within ninety (90) days and thereafter drilled diligently as hereinabove provided.

6. After discovery of oil in paying quantities in the first well, the Lessee agrees to commence the drilling of a second well within ninety (90) days thereafter, and thereafter continuously operate one string of tools, allowing ninety days between completion of one well and the commencement of the next succeeding, until three (3) wells have been drilled, including offset wells. Nothing herein contained shall be construed to limit the number of wells which the Lessee may drill, should he so elect, in excess of the number hereinabove specified.

7. In the event that oil wells shall be drilled on adjacent properties within one hundred fifty (150) feet of the boundary lines of the strip of land hereby demised at any time after the date of this lease, or in the event of any redilling or deepening of existing oil wells within one hundred fifty (150) feet from the boundary lines of

the strip of land hereby demised, it shall be the duty of the Lessee, within thirty (30) days from the date that such drilling or redrilling or deepening is commenced, to begin the construction of a derrick or instrumentality for drilling oil wells and continue diligently in the prosecution of the drilling of a new oil well to completion and production to the depth and in the strata or zone hereinabove specified at such a place on the strip of land hereby demised as to be and constitute an offset oil well to the one drilled, redrilled or deepened on said adjacent territory within the distance herein specified.

8. Drilling and pumping operations may be suspended on said property in the event that they are prevented by the elements, accidents, strikes, lockouts, riots, delays in transportation or interference by state or federal action, or the action of other governmental officers or bodies, or other causes beyond the reasonable control of the Lessee (whether similar or dissimilar to the causes specifically mentioned), and so long as the base price offered by Standard Oil Company of California for oil produced in the district in which the premises are located shall be less than seventy-five cents a barrel at the well.

9. The Lessee shall have the use, without payment of royalty, of so much of the oil, water or gas produced on said property as may be required in the operation of the property.

10. The Lessee shall pay to the Lessors on or before the Twentieth (20th) day of each and every month, a sum equal to one-sixth (1/6th) of the market price of all oil produced and run to storage or pipe line by him from said premises during the preceding calendar month, which

market price it is hereby agreed shall be the published offered price by Standard Oil Company of California, for oil of like quality and gravity at the well in the district in which the demised premises are located on date of delivery of the oil to storage or pipe line. In the event the oil requires treatment or dehydration to render it marketable, the Lessee is hereby authorized to deduct from said payment the Lessors' proportion of the cost of transportation to and from the treating plant, if same is located off the premises, and of such treating or dehydrating.

11. The Lessee shall be under no obligation to store or sell gas or water, nor to manufacture gasoline from natural gas. If any gas or water is sold, the Lessee shall pay to the Lessors one-sixth (1/6th) of the proceeds of sale of such gas or water, after deducting the cost of producing, transporting and selling the same. If casinghead gasoline is manufactured or extracted on the premises, or elsewhere, by Lessee, or by others under contract, or lease on a royalty basis from gas produced from wells on said premises, then the Lessee shall pay to the Lessors one-sixth (1/6th) of such royalty or proceeds received by Lessee from the sale of said gasoline, or the fair market value of same if used by Lessee on the premises or elsewhere, after deducting the cost of producing, gathering, transporting and selling the same.

Any royalties accuring to Lessor under this paragraph in any calandar month shall be paid by Lessee to Lessors on or before the Twentieth (20th) day of the following month.

12. Lessee shall pay all taxes on his personal property and improvements and on his oil stored on the leased

premises on the first Monday of March in each year, and five-sixths (5/6) of the increase of taxes on such portion of the leased premises as remains covered by this lease on said day, when such increase is caused by the discovery of oil thereon, whether assessed upon said land as increased valuation or as mineral rights or otherwise, and whether assessed against the Lessee or the Lessors; and the Lessors hereby agree to pay the remaining portion of such increased assessment. The Lessee is hereby authorized to pay the total amount of taxes assessed on said land, improvements and mineral rights and deduct the Lessors' proportion thereof from the amount of any rentals or royalties which shall accrue to Lessors.

13. All payments to the Lessors shall be made by paying the same to their order at California Bank at 629 South Spring Street, City of Los Angeles, State of California, or such other bank as shall from time to time be designated in writing by the Lessors, and such deposits shall relieve the Lessee from seeing to the proper distribution thereof among the several Lessors or their assigns.

14. A well in paying quantities is hereby defined as a well which, on a production test of thirty (30) consecutive days, shall have produced a daily average in said period of one hundred (100) barrels of oil, or a well producing a lesser quantity of oil which Lessee shall deem sufficiently productive to operate.

This definition shall not apply to wells to be operated on the expiration of the twenty-year period or on the abandonment of a portion of the premises, in either of which cases the Lessee may operate such wells as Lessee in his discretion shall deem sufficiently productive to operate.

15. Lessee shall carry on all operations in a careful, workmanlike manner, and in accordance with the laws of the State of California. Lessee shall keep full records of the operations and production and shipments or deliveries of products from said property, and such records and the operations on the property shall be at all reasonable times open to the inspection of the Lessors, their agents, attorneys or authorized representatives. Whenever requested by the Lessors, the Lessee shall furnish to the Lessors a copy of the log of any well drilled on said property by Lessee.

16. The Lessors shall have the right to the use of the surface of said land for agricultural, horticultural and grazing purposes to such extent as will not interfere with the proper operations of the Lessee for oil. The Lessee agrees to conduct his operations so as to interfere as little with the use of the land for agricultural, horticultural or grazing purposes as is consistent with the economical operation of the property for oil and agrees to pay for any damage which may be done to growing crops through his negligence. If any of the fences existing on said lands are cut by the Lessee for his purposes, the Lessee shall establish a good and substantial gate at such point. Whenever requested by the Lessor in writing, the Lessee shall fence all sump holes and other openings to safeguard cattle which may be grazing on said land.

17. The Lessor may have the use for his domestic purposes of any water or gas developed on said property, so long as such water or gas is not required by the Lessee or sold. Delivery of same shall be taken at a point to be indicated by the Lessee and it shall be transported to the point of use at the cost and sole risk of the Lessors.

18. The Lessee shall have at any time the right to remove any houses, tanks, pipe lines, structures, casing or other equipment, appurtenances or appliances of any kind brought by him upon said land, whether affixed to the soil or not; provided, however, that in case of the abandonment of any well in which Lessee has landed casing if the Lessors shall desire to retain the same as a water well, they may notify the Lessee to that effect, and thereupon the Lessee shall leave in the well such of said casing as the Lessors shall require, and the Lessors shall pay to the Lessee fifty percent (50%) of the cost to Lessee of such casing delivered on the ground.

19. In the event of any breach of any of the terms or conditions of this lease by the Lessee, and the failure to remedy the same within thirty (30) days after written notice from the Lessors so to do, then, at the option of the Lessors, this lease shall forthwith cease and determine, and all rights of the Lessee in and to said land shall be at an end; providing, however, that no notice need or shall be given by the Lessors to the Lessee as to time of erection of derrick, the commencing of drilling or the continuance of drilling as is herein otherwise provided for. As to such matters it is understood and agreed that this lease shall terminate by the mere failure of the Lessee to comply with such conditions.

20. Notwithstanding any forfeiture of this lease, the Lessee shall have the right to retain any and all wells being drilled, or producing or capable of producing oil or gas in paying quantities, at the time of such forfeiture, together with the aforesaid easements and appurtenances of said wells and sufficient land surrounding each well for

the operation thereof. The wells so retained shall be subject to all the terms and conditions of this lease.

21. In case any action is brought at law or in equity by third parties claiming title to the land, in hostility to the Lessors, then, during the pendency of said action, until final decision thereof, the Lessee may discontinue operations on said lands, or if he operates wells, may deposit the royalties accruing under this lease in any national bank in the City of Los Angeles to the joint account of the Lessors and Lessee.

In this connection, it is further understood and agreed that Lessee shall defend any such action as may be brought against Lessors, or either of them, without cost or expense to Lessors, and to do any and all things necessary to protect Less*rs*' rights and interest in said property.

22. Any notice from the Lessors to the Lessee must be given by sending the same by registered mail addressed to the Lessee at 822 South Kenmore Avenue, Los Angeles, California, and any notice from the Lessee to the Lessors may be given by sending the same by registered mail, addressed to the Lessors in care of the California Bank, 629 South Spring Stret, Los Angeles, California. Either party, or the assigns of either party, may at any time, by written notice to the other party, change the address to which notices shall be sent, and after such written notice to either party by the other, by registered mail, all subsequent notices shall be sent to the address therein indicated.

23. All material furnished and work done on the land by the Lessee shall be at Lessee's sole cost and expense, and Lessee agrees to protect said land and the Lessors from all claims of contractors, laborers or material men

and Lessors may post and keep posted on said land such notices as they may desire in order to protect said lands against liens.

24. On the expiration of this lease, or sooner termination thereof, Lessee shall quietly and peacefully surrender possession of the premises to the Lessors and shall, so far as possible, cover all sump holes and excavations made by him, and restore the lands as nearly as possible to the condition in which it was received.

25. The Lessee shall have and is hereby granted the express right, power and authority, in the event of default on the part of Lessors upon any contract of purchase, mortgage, deed of trust, or other lien, affecting the premises hereby leased, or any part thereof, and the foreclosure or threatened foreclosure on same, to purchase, accept and receive an assignment of such encumbrances, subject to all the rights of the owner of the premises affected thereby; or, at the election of Lessee, to pay the amount, or any part thereof which may be due, of such encumbrance and accept and receive a satisfaction and discharge thereof, in which event the Lessee shall have and retain all rights of the lienholder under said encumbrance and the property involved shall be and remain subject to a lien in favor of said Lessee in the amount of such payment.

26. If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is hereby expressely granted, the covenants hereof shall extend to and be binding upon the heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the Lessee until after the Lessee has been furnished with a written notice of transfer or assignment

or a true copy thereof; and it is hereby agreed that in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall default in the performance of any covenant of this lease as applied to such portion so assigned, such default shall not operate to defeat or affect this lease and the responsibility for the performance of all the terms and stipulations of this lease shall immediately return to the Lessee, his heirs, executors, administrator, successor or assigns. If the leased premises shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease and all rentals and royalties accruing hereunder shall be treated as an entirety and paid into the depository above provided for.

26-a It is further agreed that if the Lessee fails to find oil in paying quantities at the 6000 foot level, he will plug back in the hole, without undue loss of time, to the oil zone from which the wells on the adjacent properties are being pumped, and will operate the well at that zone and will then continue the drilling of the remaining two wells as stipulated in Paragraph 6 of this lease. All wells are to be operated to their full capacity as long as they produce oil in paying quantities, as herein provided.

27. It is agreed between the parties hereto that the Lessee and/or his assigns shall not use this lease or any part thereof as the basis for a scheme or plan to sell stock, royalties, or the raising of money to the public, and that a violation of this stipulation shall constitute a termination of this lease.

(Lawrence V. Lewis)
(M. K. Nance)

28. It is further understood and agreed that time shall be of the essence of this agreement, and that any extension, indulgence, or failure to take action shall not waive any of the terms, conditions or stipulations, including that of time being of the essence of this agreement, contained or set forth herein.

29. Lessee may at any time during the life of this lease, either before or after discovery of oil on the demised premises, upon payment to the Lessors of the sum of Ten Dollars ($10.00) quitclaim the said premises, whereupon this lease, and the whole thereof, shall be fully terminated, null and void; except that if the said Lessee shall have a producing well upon said premises in accordance with the terms and conditions of this lease, then the lease shall remain effective as to such well or wells, including the entire width of the strip of land hereby demised and a length of said strip extending one hundred (100) feet in each direction from the center of the outside casing of said oil well.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate the day and year first hereinabove written.

Lawrence V. Lewis
Evelyn L. Horton
Lessors

M. K. Nance, Lessee

State of California, County of Los Angeles) ss.

On this 31st day of May, 1933, before me, the undersigned, a Notary Public in and for said County and State, personally appeared LAWRENCE V. LEWIS and EVELYN L. HORTON, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notarial Seal) Geo. L. Lower,
Notary Public in and for the County of Los Angeles, State of California.

State of California, County of Los Angeles) ss.

On this 31st day of May, 1933, before me, the undersigned, a Notary Public in and for said County and State, personally appeared M. K. NANCE, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notarial Seal) Gwendolyn Ahlmann,
Notary Public in and for the County of Los Angeles, State of California.

United States of America,
Southern District of California,
Southern Division
County of Los Angeles
} ss.

JAMES E. DEGNAN being by me first duly sworn deposes and says: that he is one of the attorneys for Standard Oil Company of California, a corporation, plaintiff in the above entitled action, that he has read the foregoing Bill of Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; that he makes this verification for the reason that none of the officers of plaintiff reside or are located within the County of Los Angeles.

James E. Degnan

Subscribed and Sworn to before me this 31st day of August 1933

[Seal] Pearl M. Stout.

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Aug. 31, 1933. R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRELIMINARY INJUNCTION

This cause coming on to be heard this 15th day of September, 1933, in the above entitled court before the Honorable George Cosgrave, Judge thereof, upon the motion of plaintiff, Standard Oil Company of California, a corporation, for a preliminary injunction, and

It appearing to the satisfaction of the court from the verified bill of complaint herein and the affidavits of C. W. King and P. C. McConnell that the plaintiff is entitled to a preliminary injunction against the defendants restraining the commission and continuance of certain acts, which during the pendency of this action would produce injury to the plaintiff herein, and that a good and sufficient cause of action exists against the defendants in favor of the plaintiff for the relief demanded in the complaint and for an injunction order pending the trial of this action, the grounds for which, briefly stated, are as follows:

That the injuries for the prevention of which this preliminary injunction is issued are injuries to a leasehold estate in real property; that defendants are threatening to and will, unless enjoined, drill three or more oil wells on the premises embraced within such leasehold estate; that such oil wells, if drilled, would drain large and valuable amounts of oil, gas and other hydrocarbon substances from under the property embraced within said leasehold estate, the value of which leasehold estate would be materially depreciated, and the income and revenue of which would be materially decreased by said drainage; that such injuries are irreparable because they cannot be compen-

sated for in damages; that there is danger of such immediate and irreparable injury being caused to plaintiff before the trial of this case unless defendants are, until the trial of this case, restrained as hereinafter set forth.

It further appearing to the court that plaintiff is without any adequate remedy at law and is entitled to the relief demanded in the bill of complaint enjoining and restraining defendants and each of them, as hereinafter set forth, until the trial of this case; and the defendants having appeared and having in open court elected not to resist the motion,

It is, on motion of Messrs. Lawler & Degnan, attorneys for the plaintiff in this action,

ORDERED that the defendants herein named and each of them, their agents, servants and employees, and all other persons affiliated, acting, combining, conspiring, agreeing or cooperating with or for them, be and they are hereby jointly and severally enjoined and restrained from using any portion of the real property hereinafter described for the purpose of exploring, prospecting, mining or drilling for or removing oil, gas or other hydrocarbon substances and from otherwise using, occupying or obstructing any portion thereof in any manner whatsoever incidental to or connected therewith. Said real property is described as follows, to-wit:

That certain strip of land of a uniform width of forty (40) feet immediately along and adjoining on the easterly and southeasterly side of the entire length of the westerly and northwesterly boundary line of those two certain parcels of land situated in the County of Los Angeles, State of California, bounded and described as follows:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California; as per map recorded in Book 16, Pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot 72; thence along the Southwesterly line of said Lot North 73° 31′ West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North 62° 32′ East five hundred ten and seventy hundredths (510.70) feet; thence North 48° 12′ East, one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East, eight hundred thirty-six (836) feet, more or less, to beginning.

ALSO that part of the Rancho La Merced, in the County of Los Angeles, State of California; as per Patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most South Easterly corner of Lot Seventy-two (72), Tract No. 701, as per map recorded in Book 16, Pages 110 and 111 of Maps; thence south 41° 48′ East, eighty-nine and eighty-six hundredths (89.86) feet; thence South 28° 07′ 15″ East seven hundred eighty-seven and thirty-five hundredths (787.35) feet to the beginning of a curve concave to the North East and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet to the end of same; thence south 07° 46′ West one hundred fifty (150) feet; thence North 84° 38′ 10″ West seventeen hundred sixty-

seven and nine tenths (1767.9) feet; thence South 76° 17′ West, seven hundred and forty (740) feet; thence North 10° 43′ East, twelve hundred twenty-five (1225) feet; thence North 74° 55′ 50″ East, six hundred four and fifty-two hundredths (604.52) feet; more or less, to the South Westerly line of Tract Number Seven Hundred One (701); thence South 73° 31′ East eleven hundred thirty-one and four tenths (1131.4) feet; to point of beginning.

FURTHER ORDERED that this preliminary injunction shall not take effect unless and until a bond be filed by plaintiff herein in the sum of twenty-five thousand Dollars ($25,000.00) conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby.

FURTHER ORDERED that this preliminary injunction remain in full force and effect until final hearing of this cause and until further order of this court; provided, however, that any of the defendants herein shall have the right at any time upon five days' notice to plaintiff, to move for the vacation or modification of this preliminary injunction.

DATED this 15th day of September, 1933.

Geo. Cosgrave
United States District Judge.

[Endorsed]: Filed Sep. 15, 1933 at 10:55 A. M. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER OF DEFENDANTS LAWRENCE V. LEWIS AND EVELYN L. HORTON.

THE DEFENDANTS, LAWRENCE V. LEWIS and EVELYN L. HORTON, answering plaintiff's bill of complaint on file herein, for themselves and not in conjunction with any other defendant, admit, deny and allege as follows:

I.

Admit the allegations in Paragraph I of said complaint.

II.

Admit the allegations in Paragraph II of said complaint.

III.

Admit the allegations in Paragraph III of said complaint.

IV.

Admit the allegations of Paragraph IV of said complaint.

V.

Admit the allegations of Paragraph V of said complaint.

VI.

These answering defendants, and each of them, admit that Walter P. Temple and Laura G. Temple, his wife, leased, let and demised unto J. M. Kent a portion of the lands described in Paragraph VI of the plaintiff's complaint herein, as alleged therein, but deny that said or any

lease or any license, permit or privilege granted to said J. M. Kent included a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the easterly and southeasterly side of the entire length of the westerly and northwesterly boundary line of the two (2) parcels of land described in said Paragraph VI or in any part or portion thereof or thereunder; and these defendants, and each of them, likewise deny that the said J. M. Kent, or any other person or persons, either granted the said or any lease, or any right incident thereto, for the purposes set forth in said complaint or at all upon the said forty (40) foot strip of land, and allege the fact to be that said strip of land was not at any time since the acquisition of title thereto by the said Walter P. Temple leased to or under lease to anyone whomsoever; that the said strip of land in this paragraph referred to is the same strip of land as that referred to in said Paragraph VI of plaintiff's complaint as "forty foot strip".

VII.

Admit the allegations of Paragraph VII of said complaint.

VIII.

These defendants, and each of them, admit the allegations of Paragraph VIII of the complaint, except that they deny that the said Kent, or any other person or persons assigned to the Standard Oil Company, a California corporation, or to any other person, firm or corporation, a lease on the said forty (40) foot strip, or any part or portion thereof; likewise these defendants deny that the said Kent sold, assigned, transferred or delivered to said Standard Oil Company, a California corporation, all his

or any right, title or interest in said forty (40) foot strip, under or by virtue of the extension agreement mentioned in Paragraph VIII of plaintiff's complaint, or at all.

IX.

Admit the allegations of Paragraph IX of said complaint.

X.

Answering the allegations of Paragraph X defendants deny that plaintiff is now, or at any time, has been the owner of or in possession of any of the land or premises described in Paragraph VI hereof or of any right, title or interest therein or thereto. Deny that plaintiff's assignor, Standard Oil Company, a California corporation, was at any time the owner or in possession of said land described in Paragraph VI hereof (called the "forty foot strip"), or of any right, title or interest therein or thereto.

XI.

Answering the allegations of Paragraph XI defendants deny that plaintiff is now or at any time has been producing oil, gas or any other product from the real property described herein as the forty (40) foot strip, in commercial or any quantities, or at all. Defendants do not have sufficient information or belief upon the subject to enable them, or either of them, to answer the same, and basing their denial upon that ground, deny that plaintiff's leasehold estate, consisting of the land described in Paragraph VI of said bill of complaint with the exception of and excluding therefrom the land described as the forty (40) foot strip, was or is or at any time has been of a value in excess of the sum of One hundred thousand Dollars ($100,000.00), or any other sum. Defendants do not

have sufficient information or belief upon the subject to enable them to answer the same, and basing their denial upon that ground, deny that plaintiff or its predecessors in interest have complied with or fully or otherwise performed any of the obligations by it or them to be performed under the lease referred to therein as "the Temple lease" or the extension agreement thereto.

XII.

Answering the allegations of Paragraph XII, defendants deny that they, or either of them, claim any right, title or interest in or to the leasehold estate of plaintiff as described in Paragraph VI of said bill of complaint, with the exception of and excluding therefrom the land and premises described in Paragraph VI hereof and called herein the "forty foot strip", and in this connection defendants allege that they do now, and at all times since February 9th 1933 have claimed an interest in and to said forty (40) foot strip, to-wit: The fee simple title, free and clear of any leasehold or other interest, licenses, easements or other rights or privileges therein or thereto belonging to any other person, firm or corporation, and, in addition thereto, defendants do now claim, and at all times since have claimed, the exclusive right to prospect thereon for oil and/or gas. Deny that the aforesaid claims of defendants are without any right or that they, or either of them, have not any estate, right, title or interest therein or thereto. Deny that defendants' claims, as hereinbefore set forth, are subject to a leasehold or other right or estate in plaintiff, and deny that there exists over or across said forty (40) foot strip any easement or other right, in anyone other than defendants, for road or other purposes.

FOR ANSWER TO THE SECOND CAUSE OF ACTION OF PLAINTIFF'S BILL OF COMPLAINT ON FILE HEREIN, THESE ANSWERING DEFENDANTS ADMIT, DENY AND ALLEGE AS FOLLOWS, TO-WIT:

I.

Answering Paragraph I of plaintiff's second cause of action, these answering defendants refer to and incorporate, as though fully set forth herein, Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, and XI of their answer to the first cause of action.

II.

Admit the allegations of Paragraph II of the second cause of action.

III.

Answering Paragraph III of said second cause of action, these defendants admit that the Standard Oil Company, a California corporation, assigned and set over to plaintiff herein the Baldwin Lease, as therein alleged, and that the written indenture whereby the same was so assigned is of record as in said paragraph alleged; that these defendants, for want of information and belief on all other allegations in said paragraph, deny the same and all thereof.

IV.

Answering the allegations of Paragraph IV, these defendants deny that the lands embraced in said Temple Lease are surrounded only and solely by the lands embraced in the Baldwin Lease, except for the northeasterly boundary of the Temple Lease which borders upon San

Gabriel Boulevard and a portion of the south and southeasterly boundary of the Temple Lease lying east of Lincoln Avenue, and in this connection defendants allege that said Temple Lease is surrounded in part by the Baldwin Lease in part by San Gabriel Boulevard and in part by Lincoln Avenue, as aforesaid, and in addition thereto said Temple Lease is surrounded on the entire westerly and northwesterly boundary line of said Temple Lease by said forty (40) foot strip, and that said strip of land herein denominated the "forty foot strip" entirely separates the said Baldwin Lease from the Temple Lease for the area and by the distance named. Deny that the Temple Lease is surrounded on the entire or any part of the easterly and/or southeasterly side of the entire or any length of the westerly and/or northwesterly boundary line of the Baldwin Lease, or any land other than said "forty foot strip". Deny that said Temple Lease embraces approximately fifty-eight and five one-hundredths (58.05) acres or more than fifty-five and seventy-three hundredths (55.73) acres.

V.

Answering the allegations of Paragraph V, these defendants deny that said forty (40) foot strip of land lies within or constitutes any part of the Temple Lease.

VI.

Answering the allegations of Paragraph VI, these defendants do not have sufficient information or belief upon the subject to enable them to answer allegations of the same, and basing their denial upon that ground deny that the drawing or map attached to said complaint as Exhibit "C" correctly depicts the land referred to in said paragraph.

VII.

Admit the allegations of Paragraph VII of the second cause of action.

VIII.

Admit the allegations of Paragraph VIII of the second cause of action.

IX.

Admit the allegations of Paragraph IX of the second cause of action.

X.

Answering the allegations of Paragraph XI of the second cause of action, these defendants deny that they or either of them, acting by or through their agents or otherwise, entered upon said forty (40) foot strip of land on August 26, 1933, or at any other time, and deposited thereon sand, gravel, cement or water, or any other substances, by means of motor trucks or otherwise; deny that they deposited thereon tools or any apparatus or anything else on said land for the purpose of making excavations or constructing concrete posts for an oil derrick, or for any other purpose. Deny that they have at any time located or caused locations to be staked out for three (3) or any number of oil wells upon said forty (40) foot strip. Deny that they proceeded to or did at any time pour concrete posts upon which to erect a derrick, or at all. Deny that they proceeded to or did at any time proceed to or excavate a cellar or pit over which to construct a derrick, or at all. Deny that they are now, or at any time have been, engaged in the work of constructing or preparing to construct three (3) or any oil derricks upon said forty (40) foot strip.

XI.

Not having sufficient information or belief upon the subject to enable them to answer the same, and basing their denial upon that ground, these defendants deny generally and specifically each and every allegation contained in Paragraph XII of said second cause of action.

XII.

Not having sufficient information or belief upon the subject to enable them to answer the same, and basing their denial upon that ground, these defendants deny generally and specifically each and every allegation contained in Paragraph XIII of said second cause of action.

XIII.

Answering the allegations of Paragraph XIV, these defendants deny that operations in preparing to drill and/or in drilling oil wells on said forty (40) foot strip will create a serious or any fire or other hazard, or will jeopardize the safety of plaintiff's existing oil wells or improvements on said Temple or Baldwin Leases, or otherwise.

XIV.

Answering the allegations of Paragraph XV, these defendants deny that they, or either of them, threaten to drill upon said forty (40) foot strip or that they at any time have threatened so to drill thereon any oil wells whatever, and in this connection allege that all of the right, title or interest of said defendant Nance in or to said forty (40) foot strip has heretofore been terminated by reason of a certain action to quiet title thereto instituted by the defendants herein in the Superior Court of the State of California, in and for the County of Los Angeles, case

No. 363,365, wherein and whereby the title of these defendants was quieted as against said Nance, and said Nance was adjudged to have had no right, title or interest therein or thereto since August 28, 1933 and debarring said Nance forever from asserting any claim whatever in or to said land or premises adverse to these answering defendants. Defendants herein do, however, as hereinbefore alleged, claim the sole and exclusive right to said forty (40) foot strip and every part thereof, and all of the incidents of ownership thereto, and intend to and will, unless restrained by this Honorable Court, lease said forty (40) foot strip for oil and gas purposes and the drilling therefor thereon.

XV.

Deny generally and specifically each and every allegation contained in Paragraph XVI of the second cause of action.

WHEREFORE, these answering defendants, having fully answered plaintiff's bill of complaint herein, pray that

(1) It be adjudged by the Court that plaintiff take nothing by this action.

(2) That title of these answering defendants, as herein alleged, be quieted as to the plaintiff.

(3) For costs of this suit.

(4) For such other and further relief as to the Court may seem just and right.

John W. Maltman
L. G. Campbell

Attorneys for defendants Lawrence V. Lewis and Evelyn L. Horton.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles.)

LAWRENCE V. LEWIS, being first duly sworn, deposes and says:

That he is one of the defendants named in the within action; that he has read the foregoing ANSWER and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated upon information or belief, and as to those matters that he believes it to be true.

Lawrence V. Lewis

Subscribed and sworn to before me this 9th day of April, 1934.

[Seal] Kathryn Buckman
Notary Public in and for said County of Los Angeles, State of California.

[Endorsed]: Filed Apr. 11, 1934. R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

REPLY TO ANSWER OF DEFENDANTS LAWRENCE V. LEWIS and EVELYN L. HORTON.

Plaintiff, Standard Oil Company of California, by way of reply to so much of the answer of defendants Lawrence V. Lewis and Evelyn L. Horton as may be deemed to constitute a counterclaim, admits, denies and alleges as follows, to-wit:

REPLY TO DEFENDANTS' ANSWER TO PLAINTIFF'S FIRST CAUSE OF ACTION.

I.

Replying to Paragraph VI of said answer to plaintiff's first cause of action, plaintiff denies that said forty-foot strip of land was not at any time since the acquisition of title thereto by the said Walter P. Temple leased to or under lease to anyone whomsoever. On the contrary, plaintiff alleges that on or about August 11, 1915, said forty-foot strip, together with other land, was leased by Walter P. Temple and Laura G. Temple to J. M. Kent under and by virtue of that certain lease a copy of which is attached to plaintiff's bill of complaint as Exhibit "B"; that on or about November 6, 1916, said J. M. Kent assigned said lease to Standard Oil Company, a California corporation; and that on or about March 29, 1926, said Standard Oil Company, a California corporation, assigned said lease to plaintiff; and alleges that at all times since August 11, 1915, said forty-foot strip, together with other land, has been continuously leased and under lease to said J. M. Kent, Standard Oil Company, a California corporation, and plaintiff, respectively.

II.

Replying to Paragraph XII of said answer to plaintiff's first cause of action, plaintiff alleges that the claim and/or claims of said defendants to an interest or interests in and/or to said forty-foot strip, as alleged in said Paragraph XII, are each and all without any right whatsoever, and that said defendants have not, nor have either of them, any estate, right, title, or interest in or to said forty-foot strip or in or to said leasehold estate known as the Temple Lease, of which said forty-foot strip is a part, except such as may be subject to plaintiff's leasehold estate and except an easement for road purposes only over said forty-foot strip.

REPLY TO DEFENDANTS' ANSWER TO PLAINTIFF'S SECOND CAUSE OF ACTION.

I.

Replying to Paragraph I of said defendants' answer to plaintiff's second cause of action, plaintiff here refers to Paragraphs I and II of its reply to said defendants' answer to plaintiff's first cause of action, and incorporates the same herein by reference the same as if set forth in full.

II.

Replying to Paragraph IV of said defendants' answer to plaintiff's second cause of action, plaintiff denies that said Temple lease is surrounded on the entire westerly and/or northwesterly boundary line of said Temple lease, or at all, by said forty-foot strip, and denies that said strip of land denominated the forty-foot strip entirely or at all separates the said Baldwin lease from the Temple lease for any area or by any distance. On the contrary.

plaintiff alleges that said forty-foot strip is a part of and is embraced within said Temple lease.

III.

Replying to Paragraph XIV of said defendants' answer to plaintiff's second cause of action, plaintiff alleges that the judgment in Case No. 363365, Superior Court of the State of California in and for the County of Los Angeles, wherein and whereby the title of defendants Lawrence V. Lewis and Evelyn L. Horton was quieted as against defendant M. K. Nance, has not become final. Plaintiff is informed and believes, and on that ground alleges, that said defendant Nance intends to and will appeal said judgment of the Superior Court. Plaintiff alleges that the claim and/or claims of defendants Lawrence V. Lewis and Evelyn L. Horton and the claim and/or claims of defendant M. K. Nance to an interest or interests in and/or to said forty-foot strip are each and all without any right whatsoever, and that said defendants have not, nor have any of them, any estate, right, title, or interest in or to said forty-foot strip or in or to said leasehold estate known as the Temple lease, of which said forty-foot strip is a part, except such as may be subject to plaintiff's leasehold estate and except an easement for road purposes only over said forty-foot strip.

WHEREFORE, plaintiff, in addition to its prayer set forth in its bill of complaint herein, prays that defendants Lawrence V. Lewis and Evelyn L. Horton be denied any affirmative relief whatsoever in this cause.

LAWLER & DEGNAN,
By James E. Degnan
Attorneys for plaintiff.

United States of America.)
Southern District of California,) ss.
Southern Division)
County of Los Angeles)

JAMES E. DEGNAN, being duly sworn says, that he is one of the attorneys for Standard Oil Company of California, a corporation, plaintiff in the foregoing entitled action, that he has heard read the foregoing Reply to Answer of Defendants Lawrence V. Lewis and Evelyn L. Horton, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; that he makes this verification for the reason that none of the officers of plaintiff reside or are located within the County of Los Angeles.

James E. Degnan

Subscribed and sworn to before me this 19th day of April, 1934.

[Seal] Catherine A. Mack

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within Reply to Answer this .... day of April, 1934. L. G. Campbell, John W. Maltman, C. M. attorneys for defts Lawrence V. Lewis and Evelyn L. Horton. Filed Apr 20, 1934 R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk.

[Title of Court and Cause.]

MOTION TO DISMISS.

The defendants Lawrence V. Lewis and Evelyn L. Horton, defendants in the above entitled action, and they and each of them, move to dismiss the Bill of Complaint in Equity upon the following grounds:

I.

That said complaint does not contain facts sufficient to constitute a cause of action or a cause of complaint against said defendants or either of them.

John W. Maltman
L. G. Campbell

Attorneys for defendants Lawrence V. Lewis and Evelyn L. Horton.

[Endorsed]: Filed Dec. 11, 1933. R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

At a stated term, to wit: The February Term, A. D. 1934, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of March in the year of our Lord one thousand nine hundred and thirty-four.

Present:

The Honorable Geo. Cosgrave, District Judge.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,	)	
Plaintiff,	)	No. Eq.—57-C.
-vs-	)	
M. K. NANCE, et al.,	)	
Defendants.	)	

Under date of February 8th, 1934 proceedings were had on Motion of Lawrence V. Lewis and Evelyn L. Horton to Dismiss Bill of Complaint, and thereafter ordered stand submitted, and briefs having thereupon been filed, and the Court being now fully advised in the premises, and in consideration whereof orders as follows, to-wit:

The words used are not conclusively determinative of whether an exception or reservation is intended. The intention of the parties is the important factor and this can only be ascertained by an examination of the entire instrument and a complete understanding of the subject matter and the relation of the parties themselves. It cannot well be decided upon a preliminary motion. 9 Cal. Jur. 325.

The motion of defendants should be denied and it is so ordered. Exception to defendants.

[Title of Court and Cause.]

ORDER DENYING MOTION TO DISMISS.

A motion having been made herein to dismiss the bill of complaint by defendants Lawrence V. Lewis and Evelyn L. Horton on the ground that said complaint does not contain facts sufficient to constitute a cause of action or a cause of complaint against said defendants or either of them, and said motion having duly come on to be heard before this Court upon the 8th day of February, 1934, upon the bill of complaint herein, the motion to dismiss herein, and the points and authorities specified in the paper annexed to said motion, and after hearing L. G. Campbell, Esq., of counsel for defendants Lawrence V. Lewis and Evelyn L. Horton, in support of said motion, and James E. Degnan, Esq., of counsel for plaintiff, in opposition thereto, and said motion having been submitted for decision, and due deliberation having been made, and this Court having handed down an opinion directing that the motion be denied,

IT IS ORDERED that said motion to dismiss the bill of complaint herein be and the same is hereby in all respects denied.

Dated: March 21, 1934.

Geo. Cosgrave
District Judge.

Approved as to form as provided in Rule 44.
March 20th, 1934.
L. G. Campbell
John W. Maltman
Attorneys for defendants Lawrence V. Lewis and Evelyn L. Horton.

[Endorsed]: Filed Mar. 21, 1934 R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STATEMENT OF EVIDENCE.

For the purpose of completing the record in the above entitled cause respecting the proceedings had therein, in the District Court of the United States, for the Southern District of California, Central Division, and to enable the parties to have said proceedings and the judgment, orders and decree entered, reviewed on appeal, the Court does certify that the following proceedings were had in said cause.

BE IT REMEMBERED, that upon the hearing and trial of the above entitled cause upon the merits and for a permanent injunction had on the 12th and 13th days of February, 1935, before Honorable George Cosgrave, Judge, the following evidence was adduced, to-wit:

Plaintiff offered and there was received in evidence as Exhibits No. 1 and No. 1-A, respectively, a deed from H. A. Unruh, Executor of the last will and testament of Elias J. Baldwin, deceased, to Temple and a lease dated August 11, 1915, between Temple and Kent, set forth in their bill of complaint as Exhibits "A" and "B."

In view of the questions involved in this appeal and for convenience, said deed and lease are as follows:

DEED

This Indenture, Made the 1st day of October, 1912, at the City of Los Angeles, County of Los Angeles, State of California, by and between H. A. Unruh, the duly appointed, qualified and acting executor of the last will and testament of Elias J. Baldwin, deceased, late of the

County of Los Angeles, State of California, the party of the first part, and Walter P. Temple, of the County of Los Angeles, State of California, the party of the second part, Witnesseth:

That whereas, on the 4th day of November, 1908, the said Elias J. Baldwin, then in his lifetime, at the County of Los Angeles, State of California, made and executed his last will and testament, wherein and whereby he appointed said party of the first part executor thereof, and authorized and empowered the said party of the first part as such executor, to make sales of the real property belonging to his estate at public or private sale, and upon such terms and conditions, and for such prices as to him should seem best; and

Whereas, afterwards, to-wit: on the 1st day of March, 1909, the said Elias J. Baldwin died in the said County of Los Angeles, State of California, and thereafter his said will was duly filed in the office of the County Clerk of the County of Los Angeles, State of California, and thereafter, upon proceedings for that purpose duly and regularly had and taken in the Superior Court of the County of Los Angeles, State of California, the said will was duly admitted to probate as the last will and testament of said Elias J. Baldwin, deceased, and said H. A. Unruh, the party of the first part herein, duly appointed executor thereof and thereafter duly qualified, and ever since has been and is now the duly appointed, qualified and acting executor of said last will and testament; and

Whereas, afterwards, to-wit: on or about the 18th day of September, 1912, the said executor, under and by virtue of said power of sale, at the said County of Los Angeles, State of California, sold to the said party of the second

part, and said party of the second part became the purchaser of the whole of the real estate hereinafter particularly described for the sum of Five Thousand Eight Hundred Thirteen and 30/100 Dollars ($5,813.30) United States Gold Coin, he being the highest and best bidder and that being the highest and best sum bid; and

Whereas, the said Superior Court of the County of Los Angeles, State of California, upon the due and legal return of his proceedings under said power of sale, in said will contained, made by said party of the first part on the 18th day of September, 1912, after making the said sale, and upon due and legal notice of at least ten (10) days given as the law requires, did, on the 30th day of September, 1912, make an order confirming said sale and directing conveyance to be executed to the said party of the second part, a certified copy of which order of confirmation was recorded in the office of the County Recorder of said Los Angeles County, within which the said land sold is situate, on the 1st day of October 1912, which said order of confirmation now on file and of record in said Recorder's office is hereby referred to and made a part of this Indenture.

Now, Therefore, the said H. A. Unruh, as executor of the last will and testament of said Elias J. Baldwin, deceased, as aforesaid, and in consideration of the sum of Five Thousand Eight Hundred Thirteen and 30/100 Dollars ($5,813.30) United States Gold Coin to him in hand paid by the said party of the second part, receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all the right, title,

interest and estate of the said Elias J. Baldwin, deceased, at the time of his death, and also all the right, title and interest of the said estate by operation of law, or otherwise, which may have been acquired other than or in addition to that of said testator at the time of his death, in and to all those certain lots, pieces or parcels of land situate, lying and being in the County of Los Angeles, State of California, bounded and described as follows, to-wit:

That part of Lot Seventy-two (72), Tract #701, as per map recorded in Book 16, pages 110-111 of Maps, Records of Los Angeles County; beginning at the most Southeasterly corner of Lot 72, Tract #701, and running thence along the Southwesterly line of said Lot North 73° 31′ W. 1131.40 feet; thence N. 62° 32′ East 510.70 feet; thence North 48° 12′ East 100 feet, a little more or less to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East 836 feet a little more or less to beginning. Also that part of the Rancho La Merced, as per Patent recorded in Book 13, page 16 of Patents, Records of Los Angeles County. Beginning at the most Southeasterly corner of Lot 72, Tract 701, as per map recorded in Book 16, pages 110-111 of Maps, Records of Los Angeles County and running thence South 41° 48′ East 89.86 feet; thence South 28° 07′ 15″ East 787.35 feet to the beginning of a curve concave to the Northeast and having a radius of 230 feet; thence along said curve 217.22 feet

to the end of same; thence South 07° 46′ West 150 feet; thence North 84° 38′ 10″ West 1767.9 feet; thence South 76° 17′ West 740 feet; thence North 10° 43′ East 1225 feet; thence north 74° 55′ 50″ East 604.52 feet, a little more or less to the Southwesterly line of Tract #701, thence South 73° 31′ East 1131.4 feet to the point of beginning.

Subject to a right of way for poles or towers upon which to suspend cross-arms or brackeys wires for the transmission of electrical energy, as granted by Clara Baldwin Stocker and Anita Baldwin McClaughry to the Southern California Edison Company by Deed recorded in Book 4755, page 144 of Deeds, Records of Los Angeles County; excepting and reserving, however, for road purposes, a strip of land of a uniform width of forty (40) feet, immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land; and said grantee, for himself, his heirs and assigns in accepting this deed, agrees on demand to join with said grantor, his successors, or the owners for the time being, in dedicating to and for public highway purposes said strip of land so reserved.

Together with the tenements, hereditaments and appurtenances whatsoever to the same belonging or in anywise appertaining.

To have and to hold, all and singular, the above mentioned and described premises, together with the appurten-

ances, unto the said party of the second part, his heirs and assigns forever. Subject to state and county taxes for the fiscal year 1912-1913.

In witness whereof, the said party of the first part, executor as aforesaid hath hereunto set his hand and seal the day and year first above written.

(Seal) H. A. Unruh,

Executor of the last will and testament of Elias J. Baldwin, Deceased.

State of California, County of Los Angeles—ss.

On this 1st day of October, in the year one thousand nine hundred and twelve, A. D. before me, L. R. Crumb, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared H. A. Unruh, the Executor of the last will and testament of Elias J. Baldwin, deceased, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same as such Executor.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(Notarial Seal) L. R. Crumb.

Notary Public in and for the County of Los Angeles, State of California.

My commission Expires July 19, 1915.

THIS LEASE AND AGREEMENT, made and entered into this 11th day of August, 1915, by and between WALTER P. TEMPLE, and his wife, LAURA G. TEMPLE, of El Monte, California, party of the first part, and J. M. KENT, of Bakersfield, California, party of the second part.

WITNESSETH:

That, for and in consideration of the sum of fifty dollars ($50.), lawful money of the United States, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part, subject to the provisions hereinafter stated, does hereby lease, let and demise unto the said party of the second part, the sole and exclusive right to mine, dig, excavate, bore and drill for, and otherwise develop and obtain the oil, gas, asphaltum and water, together with the right to sever, remove and take such substance from the lands situated in the County of Los Angeles, State of California, bounded and described as follows:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California; as per map recorded in Book 16, Pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot 72; thence along the Southwesterly line of said Lot North 73° 31′ West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North 62° 32′ East

Five hundred ten and seventy hundredths (510.70) feet; thence North 48° 12′ East, one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East, eight hundred thirty-six (836) feet, more or less, to beginning.

ALSO that part of the Rancho La Merced, in the County of Los Angeles, State of California; as per Patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most South Easterly corner of Lot Seventy-two (72), Tract No. 701, as per map recorded in Book 16, Pages 110 and 111 of Maps; thence South 41° 48′ East, eighty-nine and eighty-six hundredths (89.86) feet; thence South 28° 07′ 15″ East seven hundred eighty-seven and thirty-five hundredths (787.35) feet to the beginning of a curve concave to the North East and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet to the end of same; thence south 07° 46′ West one hundred fifty (150) feet; thence North 84° 38′ 10″ West seventeen hundred sixty-seven and nine tenths (1767.9) feet; thence South 76° 17′ West, Seven hundred and forty (740) feet; thence North 10° 43′ East, twelve hundred twenty-five (1225) feet; thence North 74° 55′ 50″ East, six hundred four and fifty-two hundredths (604.52) feet; more or less, to the South Westerly line of Tract Number Seven Hundred One (701); thence South 73° 31′ East eleven hundred thirty-one and four tenths (1131.4) feet; to point of beginning.

EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land, reserved for road purposes.

EXCEPTING THEREFROM the most South Easterly Two (2) acres of said Tract, being bounded on the North by the San Gabriel Boulevard, on the South by that portion of the Southerly boundary line of said Tract extending Westerly from the South Easterly corner of the Tract to the proposed road hereinafter referred to, on the East by the boundary line of said Tract extending from the South Easterly corner thereof to the San Gabriel Boulevard and on the West by a proposed road to extend in a North Easterly direction from the Southerly boundary line of said tract to the said San Gabriel Boulevard, and to be located by the lessor herein on a line not more than One Hundred Seventy (170) feet West of a certain pumping plant now located on said two acres.

SUBJECT TO:

1. Right to construct and maintain a line of poles or towers over a strip of land 50 feet wide across the Rancho La Merced, as granted by Clara Baldwin Stocker and Anita Baldwin McClaughry, to Southern California Edison Company, a corporation, by deed recorded in Book 4755, Page 144 of Deeds.

2. A mortgage, executed by Walter P. Temple and Laura G. Temple, his wife, to secure a note for Thirty-eight Hundred Seventy-Five Dollars ($3875.00) dated October 2nd, 1912, due three (3) years after date, with interest at seven per cent (7%) per annum, payable semi-

annually, in favor of H. A. Unruh, Executor, filed for record October 30th, 1912.

TOGETHER also with the right hereby granted to enter into and upon said premises, and to construct, use, maintain, erect, repair, replace and remove such buildings, structures and machinery as may be necessary in carrying on the business of mining and developing said property, and the constructing, removing, repairing, replacing, maintaining and using, under, along and through the same, such pipe lines, telephone and telegraph lines, and right of way for passage as may be needed in carrying on said business and mining operations for said premises.

TO HAVE AND TO HOLD the said premises, with the appurtenances, as set forth, unto the said party of the second part, for the full period of twenty-five (25) years, and so long thereafter as oil or gas, or either or them, are produced in paying quantities thereon, unless otherwise forfeited by the said party of the second part. And the said party of the second part hereby leases, from the said party of the first part, the above described premises for the purpose aforesaid and for the term aforesaid, and upon the conditions and considerations as herein set forth.

Said first party hereby reserves the right to occupy and use said land, or to lease the same, or any part thereof, for agricultural or grazing purposes, subject to the rights of the second party herein named, which, for mining purposes shall be exclusive.

The second party agrees to commence the drilling of a well on said premises within six months from the date hereof, and prosecute the same with reasonable diligence

until oil is found in quantities deemed paying quantities by the second party or further drilling is unprofitable, or pay at the rate of Thirty Dollars ($30) in advance for each additional month, for a period not exceeding twelve additional months, until said well shall have been commenced or this contract surrendered as hereinafter provided.

The second party may, at any time, surrender this grant upon payment to the first party of Thirty Dollars ($30.), and any further sums due under the terms hereof to the first party, and thereafter shall be relieved of all further obligation hereunder, but such surrender shall be in writing.

If oil is found in paying quantities in first well drilled, second party agrees to commence the drilling of a second within three months after first well is completed and to continue drilling additional wells to be commenced successively in three months after completion of preceding well until five wells in all have been completed, or the second party shall forfeit all the land except ten acres for each completed well. In the event of a surrender of this lease as to the undrilled portion or part of said premises, the second party may, at its option, continue the possession of all producing or drilling wells, together with ten acres around each such well, subject to the provisions of this lease and so long as any of said wells are being drilled or operated by said second party.

The said party of the second part shall pay to the party of the first part, as royalty and rent for said premises, the one-eighth (1/8) part of all the oil, gas and asphaltum produced and saved therefrom, to be delivered to the party of the first part on the part of the land where pro-

duced or saved; after deducting, however, all the water, oil or gas produced therefrom and used by the party of the second part in its operations thereon, which water, oil or gas may be so used without accounting to or paying said party of the first part therefor. The party of the first part shall be entitled to use, free of charge, any water developed by the party of the second part, and not used by the party of the second part for operations hereunder or in connection therewith.

Should the party of the first part elect to have the party of the second part purchase the one-eighth (⅛) part, rent or royalty aforesaid, then the said party of the second part, upon thirty (30) days' notice in writing from time to time of such election, hereby agrees to purchase, take and receive all of said one-eighth (⅛), and shall pay therefor the same price that others are being paid at the time by the party of the second part for mineral products of like character in the same vicinity, and such payments shall be made to the said party of the first part on the fifteenth day of each month, for all of said rent and royalty produced during the preceding calendar month, but if said royalty is taken in kind, the royalty oil shall be delivered as produced into tanks maintained on the land for that purpose, by the said party of the second part, and the same shall be stored in such tanks, free of charge to said party of the first part, for a period of thirty (30) days; and if gas is found and saved and sold by the second party, the second party agrees to pay one-eighth (⅛), the royalty aforesaid, of the proceeds received by it from the sale of such gas for use off the premises, but nothing herein contained shall obligate the second party to produce, save or sell gas from any well on said premises.

The rent and royalty aforesaid shall be ascertained, computed and paid monthly, and for the purposes of ascertaining the amount of and account thereof, the said party of the second part shall keep true and correct books of account showing the production of said substances, from the said premises, which account shall be open and free to the inspection of the said party of the first part, and said party of the second part shall furnish to said party of the first part written monthly statements of the production of said premises, for the preceding calendar month, and settlement thereof shall be made between the parties hereto on the fifteenth of each calendar month.

The said party of the second part shall pay all taxes that may be levied against the improvements, plants, machinery and the real and personal property, including oil and minerals belonging to the second party that may be stored on said premises, before the same become delinquent. The party of the second part agrees to operate and pump completed wells on the premises so long as said wells shall produce oil in paying quantities, and, between the parties hereto, a well on said premises shall be deemed to produce oil in paying quantities within the meaning of this agreement if it shall produce not less than one hundred (100) barrels a day of twenty-four (24) hours for at least thirty (30) successive days; provided, however, that the party of the second part may elect to consider a well as producing oil in paying quantities when the same produces less than one hundred (100) barrels per day of twenty-four (24) hours for thirty (30) consecutive days.

The said party of the first part shall have the right to examine at all times the said demised premises, and the

work done, and in progress thereon, and the production therefrom, and shall also have the right to inspect the books kept by the said party of the second part in relation to said property, to ascertain the production and amount sold and shipped therefrom; the said party of the second part shall give to said party of the first part due notice of all litigation involving the said premises, as soon as such litigation is known to said party of the second part, and it is hereby further provided that the said party of the second part shall have the right to remove from said premises all machinery, rigs, piping, casing, pumping stations, and other property and improvements belonging to, or furnished by, said party of the second part, except the first string of stovepipe casing in the first well drilled, provided, however, that such removal shall be done without damage to said premises, or any drilling work that may be in progress thereon at the time, and that such removal shall be done before the termination, or within a reasonable length of time after the termination, of this lease.

That in the event the said party of the second part should fail to keep and perform each and all of the covenants and terms and conditions herein contained, by said party of the second part to be performed, then, in such event, all the rights of the said party of the second part hereunder shall, at the option of the said party of the first part, after the failure of the party of the second part to make good such default for thirty (30) days after written notice thereof to said party of the second part, unless such default be caused by, or arise out of, causes beyond the control of the party of the second part, cease and terminate and be of no further effect, and the said

party of the second part shall thereupon, and on written demand therefor made, redeliver the possession of said premises to said party of the first part, and thereupon the said party of the first part shall have the right to re-enter said premises and remove all persons therefrom.

That all the labor to be performed and material to be furnished in the operation hereunder, shall be at the cost and expense of the said party of the second part, and the said party of the first part shall not be chargeable with, nor liable for any part thereof, and that during the life of this lease, the said party of the second part shall keep the premises duly and fully protected against all liens of every character, and in the event of any lien being placed thereon to the knowledge of said party of the second part, he shall at once notify the said party of the first part thereof.

It is further understood and agreed, that the first party shall not in anywise, nor at any time during the currency of this lease, bore, mine, sink or drill any well or wells for the development and extraction of any oil, petroleum or other petroleum or hydrocarbon substances, or permit, cause or suffer any one to bore, sink, mine or drill any such well or wells for any such purposes upon the said two acres of land hereinbefore referred to as excepted from this lease.

And, in further consideration of this lease, it is agreed that, if the said first party shall at any time desire to sell or lease the said two acres of land or any part thereof, then he shall not lease or sell or cause, suffer or permit any one to lease or purchase the same without first giving the second party herein the sole, exclusive and prior right and option to lease or purchase said two acres of land

upon as favorable terms and conditions as any other bona fide lessee or purchaser might be willing to take or buy the same; but if any other person or persons should lease or buy said two acres, or any part thereof, then, and in that event, such purchaser or lessee shall take said land subject to the terms and conditions of this lease.

The party of the first part agrees to pay and discharge all taxes levied and assessed against the premises which are the subject of this lease, and the party of the second part agrees to pay all taxes levied and assessed during the life of this lease upon property installed by him upon said premises; and the parties hereto shall pay all taxes assessed against the mineral rights on said lands as follows: The party of the first part to pay one-eighth (1/8), and the party of the second part to pay seven-eighths (7/8), of said taxes.

It is further agreed that time is expressly made of the essence of this agreement.

It is mutually agreed by and between the parties hereto that all rights, terms, covenants, agreements, conditions and obligations herein contained shall be binding upon the said parties hereto and upon their representatives, heirs, administrators, successors and assigns.

IN WITNESS WHEREOF, the parties of this lease have to these presents set their hands and seals the day and year first above written.

(Signed) Walter J. Temple
(Signed) Laura G. Temple
(Signed) J. M. Kent

Plaintiff also offered and there was received in evidence, as Exhibit No. 2, a written agreement executed under date of April 4, 1916, by Walter P. Temple and his wife, Laura G. Temple, as parties of the first part, and J. M. Kent, as party of the second part, whereby the original term of said lease, Exhibit "1-a" was extended for one year.

Plaintiff further offered and there was received in evidence, as Exhibit No. 3, a certain lease dated October 9, 1916, between Anita M. Baldwin, as lessor, and Standard Oil Company, as lessee, which exhibit is in words and figures as follows, to-wit:

THIS AGREEMENT, made this 9th day of October, 1916, between ANITA M. BALDWIN of the County of Los Angeles, State of California, party of the first part, herein styled the "Lessor," and the STANDARD OIL COMPANY, a corporation organized under the laws of the State of California, party of the second part, herein styled the "Lessee,"

WITNESSETH:

That for and in consideration of the sum of Ten Dollars ($10), Gold Coin of the United States of America, to the Lessor paid, and of other valuable considerations, the receipt of all of which is hereby acknowledged, and in consideration of the performance by the Lessee of the covenants and agreements hereinafter contained, the Lessor does lease, let and demise, unto the Lessee, the land hereinafter described, with the sole and exclusive right to the Lessee to drill for, produce, extract and take oil, gas, asphaltum and other hydrocarbon substances, and

water from, and store the same upon, said land during the term hereinafter provided, with the right to enter on said land at all times for said purposes, and from time to time to construct, use, maintain, erect, repair, replace and remove thereon and therefrom all buildings, tanks, machinery, telephone and telegraph wires, and other structures, including all pipe lines, which the Lessee may desire in carrying on its business and mining operations on said premises, with rights of way for passage over and upon and across, and ingress to and egress from, said premises.

The possession of the Lessee of the lands held by it under this lease, shall be sole and exclusive, except as hereinafter provided.

The said lands which are the subject of this lease are situated in the County of Los Angeles, State of California, and are more particularly described as follows:

Part of Lot Seventy-two (72) of Tract No. 701, as per map recorded in Book 16, Page 110 of Maps, records of Los Angeles County, and part of the Rancho La Merced, described as a whole as follows:—

Beginning at a point in the Northerly line of said Lot Seventy-two (72), at the intersection of the lines shown on said map as South 32° 07′ East 862.96 ft. and South 70° 52′ East 952.01 ft., said point of beginning being the Northeast corner of land conveyed by Anita M. Baldwin to Clara Baldwin Stocker by deed dated Sept. 27, 1916, filed for record in Book 6342, page 165, of Deeds, Records of Los Angeles County; thence along the Easterly line of land so conveyed to Clara Baldwin Stocker, South 41° 03′ West 452.8 ft., South 9° 29′ West 1143.87 feet; South 74° 42′ West 896.2 ft; North 75° 26′ 20″

West 699.1 ft; South 69° West 339 ft; South 12° 29′ West 1113.50 ft; South 77° 35′ West, 836.84 feet; North 79° 56′ 30″ West 550 feet; South 22° 26′ West 730 feet; South 50° 23′ West 304.4 feet and South 37° 32′ West 1212 feet to the Southwesterly Patent boundary line of said Rancho and the Southeast corner of land so conveyed to Clara Baldwin Stocker; thence along said patent line South 42° 41′ East 1480 feet to the most Westerly corner of land conveyed to Edwin G. Hart by deed recorded in Book 4937, Page 228 of Deeds; thence along the Northerly line of land so conveyed to Hart North 70° 52′ East 3330.64 feet and South 85° 53′ 40″ East 2733 feet to the Northeast corner of said land of Hart; thence along the Easterly line of said land South 26° 29′ East 638.42 feet to the Northerly line of the Extension of Lincoln Avenue; thence along the Northerly and Westerly lines of said Avenue, North 62° 51′ 15″ East 728.27 feet; South 85° 58′ 30″ East 380.48 feet; North 64° 32′ 55″ East 356.60 feet; North 74° 59′ 30″ East 856.14 feet; North 78° 02′ 15″ East 329.73 feet; North 66° 56′ East 202.42 feet; North 34° 37′ 45″ East 53.44 feet; North 12° 45′ 15″ East 80.97 feet; North 18° 06′ 45″ East 216.43 feet North 26° 02′ 15″ East 395.91 feet; North 18° 55′ 45″ East 96.95 feet and North 38° 21′ 30″ East 10.34 feet to the Southerly line of land conveyed to Walter P. Temple by deed recorded in Book 5193, Page 239 of Deeds; thence along the line of land so conveyed to Temple North 84° 38′ 10″ West 1146.92 feet to an angle in said line; thence still along said line South 76° 17′ West 740 feet; North 10° 43′ East 1225 feet; North 74° 55′ 50″ East 604.52 feet; North 62° 32′ East 510.70 feet and North 49° 12′ East 100 feet to the

most Northerly corner of land so conveyed to Temple, on the Easterly line of said Lot Seventy-two (72), of Tract No. 701; thence along said Easterly line of Lot Seventy-two (72), North 41° 48′ West 895.04 feet; thence Westerly along the Northerly line of said Lot Seventy-two (72) to the place of beginning.

Containing in said Lot Seventy-two (72) 124.866 acres, more or less and in the Rancho La Merced 587.407 acres more or less.

Unless this lease shall be sooner forfeited or otherwise terminated as hereinafter provided, the Lessee shall hold said premises, with the appurtenances, for the period of Twenty (20) years from the date hereof, and so long thereafter as oil, gas, asphaltum or other hydrocarbons are produced in paying quantities thereon; and the Lessee hereby leases from the Lessor the above described premises for the purposes and term aforesaid, and upon the conditions and for the consideration herein set forth.

The Lessee shall commence the drilling of a well for oil on said premises within sixty (60) days from the date hereof, and shall prosecute the drilling of said well with reasonable diligence until oil is found in quantities deemed paying quantities by the Lessee, or until said well has been drilled to a depth of Twenty-five Hundred (2500) feet. Should oil not be obtained in paying quantities in the said first well, the Lessee shall, as a condition of the continuance of any of the rights to it given by this present instrument, within ninety (90) days after drilling has ceased on said first well, commence, upon the premises the drilling of a second well, and shall prosecute the drilling of same with reasonable diligence until oil is found in quantities deemed paying quantities by the Lessee, or

until said second well has been drilled to a depth of Twenty-five Hundred (2500) feet. Should oil not be obtained in said second well within ninety (90) days after cessation of the drilling thereon, the Lessee shall, as a similar condition of the continuance of its said rights, commence the drilling of a third well, and continue the same as provided in the case of the first and second wells; and shall continue to drill a well under like terms and conditions, subject to like obligations, so long as the Lessee claims any rights under this present instrument, and until oil in paying quantities is struck.

After the Lessee shall strike oil in paying quantities in any well drilled by it, the Lessee shall thereafter keep two strings of tools in continuous operation on said premises until the Lessee has drilled thereon forty (40) wells, after which time the Lessee shall not be bound to conduct further drilling operations on said premises, provided however that the Lessee shall be entitled to drill on said premises as many additional wells as it desires after the completion of the first or any subsequent well herein provided for. The Lessee may at its election, at any time after the completion of the first well or of any subsequent well, cease further drilling, and if said full number of forty (40) wells shall not then have been drilled the Lessee shall thereupon forfeit and surrender this lease, and this lease shall thereupon terminate as to all of said premises except ten (10) acres surrounding each producing well or well being drilled, each of which said ten (10) acre tracts the Lessee may hold free of further drilling obligations as long as oil is produced from the well thereon, or gas is produced and marketed from the well thereon. Each said ten (10) acre tract shall in each instance be

in the form of a square or rectangle, the longer sides of which shall not exceed more than twice the length of the shorter sides.

At the expiration of the term of twenty (20) years from the date hereof, no further well shall be drilled by the Lessee upon the premises herein leased, except with the written consent of the Lessor.

The Lessee shall pay to the Lessor as royalty and rent for said premises a one-eighth (⅛th) part of all oil, asphaltum or other hydrocarbon substances extracted and saved from said premises. For all gas produced and saved and sold off the premises by the Lessee, the Lessee shall pay as rent and royalty one (1) cent per thousand cubic feet measured on an eight ounce base, provided nothing herein contained shall be deemed to obligate the Lessee to produce, save, sell or otherwise dispose of gas from said premises, or any well thereon.

The Lessee shall not be required to account to the Lessor for, or pay rent or royalty on, oil, gas or water produced by the Lessee from the premises and used by it in its operations hereunder, but may use such oil, gas or water free of charge.

Other than the royalty gas, the Lessor's royalty shall be delivered to the Lessor on the part of the land where produced or saved, and if taken in kind such royalty shall be delivered as produced and saved into tanks maintained on the land for that purpose by the Lessee, and shall be stored in such tanks free of charge to the Lessor for a period of thirty (30) days. Should the Lessor elect to have the Lessee purchase such royalty, the Lessee upon thirty (30) days' notice, in writing, of such election,

hereby agrees to purchase, take and receive all of said rents or royalty, and shall pay therefor the current prices paid by the Lessee from time to time to producers for production of like character, gravity and quality, in the same vicinity, and such payments shall be made to the Lessor on the fifteenth (15th) day of each month, for all rent and royalty produced during the preceding calendar month.

The Lessor may, at any time and as often as desired by the Lessor, upon thirty (30) days' notice in writing to the Lessee, change her election as to the method of taking the oil royalty.

The rent and royalty aforesaid shall be ascertained, computed and paid monthly, and for the purpose of ascertaining the amount and account thereof, the said Lessee shall keep true and correct books of account showing the production of said substances, from the said premises, which account shall be open and free to the inspection of said Lessor, and said Lessee shall furnish to said Lessor monthly written statements of the production of said premises, for the preceding calendar month, and settlement thereof shall be made between the parties hereto on the fifteenth day of each calendar month.

The Lessee agrees to operate each completed well on the premises to its full capacity, so long as such well shall produce oil in quantities deemed paying quantities by the Lessee, while this lease is in force, as to the portions of the premises on which such well is situated.

The drilling or pumping obligations of the Lessee hereunder shall be suspended while, but only so long as, the Lessee is prevented from complying therewith, in part or

in whole, by strikes, lockouts, acts of God, unavoidable accidents, or other matters beyond the control of the Lessee.

The Lessor shall have the right to examine at all times the lands herein demised, and the work done, and in progress thereon, and the production therefrom, and shall also have the right to inspect the books kept by the said Lessee in relation to said property, to ascertain the production and the amount shipped therefrom.

The Lessee agrees, on request, to furnish the Lessor with copies of logs of all wells drilled by the Lessee on the lands herein demised.

The Lessee shall give to said Lessor due notice of all litigation involving the lands herein demised.

The Lessee shall have the right to remove from time to time from said premises all machinery, rigs, piping, casing, pumping stations, and other property and improvements belonging to or furnished by said Lessee, provided, however, that such removal shall be done without damage to said premises or any wells thereon, and shall be done before or within ninety (90) days after the termination of this lease.

All labor to be performed and material to be furnished in the operations hereunder shall be at the cost and expense of the said Lessee, and the said Lessor shall not be chargeable with, nor liable for, any part thereof, and during the life of this lease said Lessee shall keep the lands herein demised duly and fully protected against all liens of every character arising from, or connected with, its operations, and in the event of any such lien being

placed thereon to the knowledge of said Lessee it shall at once notify the said Lessor thereof.

The Lessee shall pay all taxes that may be levied against the improvements, plants, machinery and personal property, including oil and minerals, that may be stored on said premises before the same become delinquent.

If the assessed value of the premises herein leased shall be increased over and above the amount at which said premises were assessed for the present fiscal year, and such increase shall be due to the operations of the Lessee on said premises, the Lessee shall pay seven-eighths (7/8ths) of the taxes upon such increased value. The Lessee shall further pay seven-eighths (7/8ths) of all taxes assessed against the minerals and mineral rights of said premises.

Subject to the foregoing provisions the Lessor agrees to pay all taxes assessed against said premises, and one-eighth (1/8th) of the taxes assessed against the minerals and mineral rights of said premises, whether the same be assessed in whole to the Lessee, or to the Lessor, or assessed otherwise.

The Lessor hereby reserves the right to use, or to lease, for agricultural or grazing purposes, such portions of said premises as the Lessee does not employ in its operations on said premises, but the exercise by the Lessor of the rights herein reserved shall be without interference with the operations of the Lessee on said premises.

The Lessee agrees to erect and maintain fences around any portion of said premises employed by the Lessee in

its operations when requested by the Lessor. The Lessee shall, at all times, keep closed all gates and fences surrounding or on said premises.

The Lessee agrees to lay all pipe lines constructed by it through cultivated fields below plow depth, when so requested by the Lessor.

If water be developed and produced by the Lessee on the premises the Lessor reserves to herself any unused portion, but the use by the Lessor of such portion of water shall be at her own expense and risk, and shall be taken at a point or points designated by the Lessee.

If the Lessee shall fail, for a period of ninety (90) days after written notice given to it at its office in San Francisco, California, by the Lessor, to comply with any provisions of this lease, the Lessor may, at her option, terminate this lease; provided that no default in the performance of any of the conditions or provisions hereof as to any well or wells on any parcel of ten (10) acres surrounding the same, as hereinbefore provided, shall affect the right of the Lessee to continue its possession or operation of any other well or wells situated on any other such parcel of ten (10) acres.

The said Lessee shall not assign this lease or any interest therein nor sublet said premises or any part thereof without the consent, in writing, of said Lessor.

Time is hereby expressly made of the essence of this agreement and of each of its provisions.

IN WITNESS WHEREOF, on the day and year first above written, the Lessor, and party of the first part, has signed this agreement, and the Lessee, and party of

the second part, has caused its corporate name to be hereunto signed, and its corporate seal hereunto fixed, by its officers thereunto duly authorized.

Executed in Duplicate.

ANITA M. BALDWIN
Party of the first part and Lessor.

STANDARD OIL COMPANY,
by F. H. Hillman
Vice President,

(Corporate Seal)

by H. M. Store
Secretary.

STATE OF CALIFORNIA,)
) SS.
County of Los Angeles)

On this 10th day of October, in the year nineteen hundred and 16, A. D., before me, Russell C. Wright, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared ANITA M. BALDWIN personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

(Notarial Seal) Russell C. Wright
Notary Public in and for Los Angeles County,
State of California.

My Commission Expires Aug. 8, 1920.

That both said Baldwin and Temple leases are situated in the Montebello Oil Field, in Los Angeles County, California, and except for the Northeasterly boundaries of the Temple lease, which borders upon San Gabriel Boulevard, and a portion of the South and Southeasterly boundary of said Temple lease lying East of Lincoln Avenue, the lands embraced in said Temple lease are surrounded by the lands embraced in the Baldwin lease.

Plaintiff offered and there was received in evidence, as Exhibit No. 4, a written assignment dated November 6, 1916, executed by J. M. Kent and recorded November 28, 1916, in Book 104, page 333, of Leases, Records of Los Angeles County, California, whereby said J. M. Kent sold, assigned, conveyed, transferred and delivered said Temple lease, Exhibit 1-a, to Standard Oil Company, a California corporation, together with all the rights and privileges, incidents and appurtenances of the estate and interest in and to the said real property created by said lease and agreement or then used and enjoyed by said J. M. Kent in connection therewith, and in and to the oil, gas, asphaltum and water in and under such real property; and whereby said J. M. Kent likewise sold, assigned, conveyed, transferred and delivered to said Standard Oil Company all his right, title and interest in, under or by virtue of that certain extension agreement described above as Exhibit No. 2; and

Plaintiff further offered and there was received in evidence, as Exhibit No. 5, a written assignment dated March 29, 1926, executed by Standard Oil Company, a California corporation, whereby said Standard Oil Company, a California corporation, as assignor, conveyed, transferred, assigned and set over to Standard Oil Com-

pany of California, plaintiff herein, said Temple lease set forth above as Exhibit 1-a, and said extension agreement described above as Exhibit 2, and all of said assignor's right, title and interest in, under and by virtue thereof, together with all of said assignor's right, title and interest in and to the real property in said lease described and in and to the oil, gas, asphaltum and water therein and thereunder; and together with said Baldwin lease set forth above as Exhibit No. 3, and all of said assignor's right, title, and interest therein and thereunder.

Thereupon,

JERRY M. KENT

was called as a witness for plaintiff and testified as follows:

"I am the person named in the lease from Walter P. Temple and wife to J. M. Kent dated August 11, 1915. At that time I was in the oil business operating in Kern County. I had been drilling wells and developing oil properties. My associations with the Standard Oil Company consisted of getting leases. I sold them a great many leases to properties. Mr. F. H. Hillman of the Standard Oil Company had charge of production. I was very well acquainted with him. I was instructed to procure leases in and to the Montebello district in 1915. These instructions were from F. H. Hillman, who was then vice-president of the Standard Oil Company. He has since died. I investigated properties in the Montebello district. It came about as follows: I was riding with Mr. Hillman down through the oil fields, and he was drilling out on

(Testimony of Jerry M. Kent)

the field apart from the Coyote Hills. He wasn't having very good luck. I said, "Why don't you go up in the hills?" He said, "I think you are right." I said, "I believe there is oil up in those hills." He said, "All right, you find out and I will lease it from you." I went back to the hotel, and Mr. Arthur Fisk, who was Mrs. Baldwin's manager, Anita Baldwin, got to talking about Baldwin owned this property, and there was a gentleman down there named Temple, had a piece of ground that had some gas showings coming to the surface, and I went down and saw Mr. Temple, and got the lease, told Mr. Hillman about it, and he said if I could get the lease, he would take them. That was along about July in 1915 when I first went there and when I first talked with Temple. Standard sent men down there to examine that property after I reported to Mr. Hillman.

After I had talked to Mr. Hillman I began negotiations with Mr. Temple. Before that I had not gone upon the property. Afterwards I went upon the property, walked about and found gas and would light it. That indicated to me, as an oil man, that it was possible oil property. I discussed a lease of the property with Mr. Temple. He said there was a lease on it and the fellow had forfeited, had not lived up to the obligations, and he would have it cancelled and make a deal with us. I discussed the terms of the lease at that time. Temple said a fellow by the name of Levy held the lease then on the property. Temple did not show me the Levy lease at that time.

I went back to visit Mr. Temple many times after that. At one of those meetings Temple handed me a copy of the Levy lease and I read it. I noted therein the clause with

(Testimony of Jerry M. Kent)

respect to the 40-foot strip. When I first saw the Levy lease Mr. Temple brought it to my office in the Merritt Building. I then noticed this clause. I asked Temple what that was for, if that was not an easement for road purposes only, and he said "Yes," and I explained to him that we couldn't take any lease there unless the properties were adjoining each other. I told him that the leases were to go to the Standard Oil Company. I told Mr. Temple that the Standard Oil Company wouldn't take his lease without the Baldwin lease and they would not take the Baldwin lease without his lease.

At that time I was endeavoring to obtain a lease of the Baldwin property for the Standard Oil Company and told Temple I was going to. Temple said that strip of ground was an easement for road purposes only. During our negotiations I went with Mr. Temple upon the property. He had a house upon a portion of that strip located on the two acres down on the point. I went to see him there many times. On one of those occasions I went with Mr. Temple to ascertain the boundaries of the lease and was driven to his place in an automobile. He and I drove along San Gabriel Boulevard. I observed a wire fence along San Gabriel Boulevard on the side of the Temple and Baldwin properties both. We went in the automobile up to what Temple spoke of as the line between his and the Baldwin property. I noticed there was a fence running at right angles to the fence on the San Gabriel Boulevard. That fence extended along, as near as the

(Testimony of Jerry M. Kent)

map will disclose now, the northwesterly boundary line of the Temple property. That is what Mr. Temple said. Temple said that fence was where his line was. The fence that I am speaking of is a fence that runs at right angles to the San Gabriel Boulevard fence. Temple said the Baldwins owned the property on the other side, the fence being the division line. The line was pointed out for the purpose of showing me what would be included in the lease. That fence ran as far as I could see. Before that I had walked over the property and had observed a fence up on the northwesterly line there.

After that there was a lease prepared. I don't know whether I prepared it or Mr. Temple prepared it. It practically covered the Levy lease, with which I had nothing to do in the preparation. The lease was finally brought to me by Temple for signature in my office.

When the Levy lease was shown to me, I observed a clause in there with respect to the 40-foot strip, and I asked Temple what that clause meant and he said it was for road purposes only, an easement for road purposes only.

Mr. Temple prepared that lease. I made some notations on his copy as I remember. We went to his attorney, a fellow by the name of Roberts. Roberts prepared the lease from Temple to me. After its preparation it was handed to me by Temple for execution. I examined it and observed therein the clause with respect to the 40-

(Testimony of Jerry M. Kent)

foot strip. Temple and I went over the same conversation. I told him that the Standard Oil Company wouldn't take any lease on any property unless they were adjoining properties where they could not have any offsetting wells. In response to my statement about the 40-foot strip Temple said there wouldn't be any wells drilled on it, it was for road purposes only. That is, the enjoyment of the surface could not be used, but the strip was for road purposes only. Temple wanted to reserve the surface rights to go across the ground down there where his house was. This was agreed upon and that is the second exception that appears in the lease. I am familiar with that 40-foot strip clause. The sense in which I understood the words therein used to have been employed was that there was an easement for right-of-way for road purposes only."

Upon cross-examination, said witness testified that at the time he and Mr. Temple had inspected the boundaries, Mr. Temple told the witness that he owned up to the fence referred to by the witness in his direct examination, and that "was his boundary line, the fence was along his line," but in his conversations with Mr. Temple, Mr. Temple did not say anything indicating which side of the fence the right-of-way was on; that Temple did say that fence ran with the Baldwin property, came up to the fence line.

(Testimony of Milton Kauffman)

Thereupon

MILTON KAUFFMAN

was called as a witness for plaintiff, and testified as follows:

"I was in business in Los Angeles and vicinity in 1914-1915 and 1912. My business was that of appraiser and real estate. I was associated with Walter P. Temple and transacted business for him. I acted as the agent in the purchase by Walter P. Temple of the H. A. Unruh property in question here and handled the details of it. I talked with Mr. Unruh with respect to the deed. Mr. Unruh in the negotiations for the purchase of this property told me he wanted to have a reservation for a road that would be of benefit to that property that they had left there and eventually connecting up the Montebello district, that he wanted to have it so arranged that they would always be sure that a road could be opened there. There was also something said about a subdivision. At that time I had an option from Mr. Unruh and the Baldwin heirs for all of the balance of that property at a stipulated price, and was intending to subdivide that for small farms and requested at the same time that some way be made that a road could be put in there to facilitate a subdivision. At the time the deed was prepared I went upon the property with Mr. Temple. Mr. Unruh's son, Dave, was an engineer and he had Mr. Temple and me go along and we walked over the whole boundary line. He had staked it off. Mr. Temple wanted to buy about 60 acres of the land, and I told Mr. Unruh and his son Dave about

what he wanted out of that full tract, and he prepared a map showing it just as it is today, and said if we wished to go over it, he would meet me out there and Mr. Temple would go over it and show the stakes showing the boundaries of the land. We did, and Dave Unruh was there and a man named Richardson. The stakes were set along the boundary line of the Temple and Baldwin properties. There were stakes all around the property, possibly four or five stakes. They were visible and were placed upon the outer boundary line of the strip in question.

After the property was purchased by Temple, a fence was erected on the bo*ud*ary line of the property by the Baldwins, that is to say, the fence was placed in accord with the stakes that had been driven by the engineer previously, and enclosing the Temple strip beginning at a point on San Gabriel Boulevard. At that time there was a fence on San Gabriel Boulevard, it having been maintained for years. A gate was put through that fence line on San Gabriel Boulevard about 1913 by Mr. Temple. The gate was very close to the Baldwin line, I would judge without measuring 15 or 16 feet, maybe 25 feet, somewheres like that.

The fence was erected by the Baldwins along the northwesterly and westerly boundary of the strip shortly after the property was purchased by Mr. Temple, approximately within six months. I went upon the Temple property pos-

(Testimony of Milton Kauffman)

sibly once a week. Up to 1915 the time of making this lease, I went upon the property and observed the condition of the fences thereon and observed that the fence erected by the Baldwins in 1913 was still in place. They were on the stakes situated on the boundary line between the two places there by the engineer.

The letter dated January 10, 1921, addressed to the Standard Oil Company, San Francisco, signed by Walter P. Temple and by Milton Kauffman, which letter has been handed to me, bears my signature. I sent that letter to the Standard Oil Company and conferred with Mr. Temple about it before sending it. We did that every year when we paid the taxes, we sent the letter. I had knowledge of it."

Thereupon plaintiff offered and there was received in evidence, as Exhibit 6, the following document:

"January 10th,
1921

Standard Oil Company,
San Francisco, Cal.

Gentlemen: Attention: Tax Department.

Enclosed please find bill for $253.32, being your share of the Los Angeles County taxes in accordance with our lease. The total amount of taxes, as you will notice by

(Testimony of Milton Kauffman)

the enclosed tax statement numbers 333832 and 342064 is $394.60. The taxes of 1916, being $105.09, leaves a difference in increase of $289.51. Your share being seven-eighths makes the amount $253.32.

I am also enclosing you a tax bill showing the assessment number 262786 referred to which has been paid. This is a personal property tax, and has nothing to do with the lease mentioned.

Very truly yours,

WALTER P. TEMPLE,

By Milton Kauffmann

MK:MG Manager"

Encls.

Thereupon the witness resumed his testimony as follows:

"I received an answer to all those letters. I received the original of the letter from the Standard Oil Company to Walter P. Temple, carbon copy of which is now shown me. The signature upon the receipt dated January 18, 1921, purporting to be signed by Walter P. Temple, which receipt is now handed me, is the signature of Walter P. Temple. The amount of money we asked of the Standard was $253.32. They sent us that money and they sent us that receipt. The receipt was signed by Mr. Temple and I mailed it back to the company after it was signed."

(Testimony of Milton Kauffman)

Thereupon plaintiff offered and there was received in evidence, as Exhibits 7 and 8 respectively, the following documents:

"Jan. 17, 1921.

Mr. Walter P. Temple,
El Monte, California

Dear Sir:

Herewith I hand you check for $253.32 to your order to reimburse you for this company's proportion of 1920-21 taxes on land leased from you in Los Angeles County, as per your letter of January 10, 1921. I enclose the three bills sent with your letter which you requested returned. Please sign the tax receipt and return in accompanying envelope.

Yours truly,

GMF.
Enc.

"

"El Monte, Cal. January 18, 1921

Received from Standard Oil Company, $253.32 reimbursement of Standard Oil Company proportion of 1920-21 taxes on land leased from me in Los Angeles County as per my letter of January 10, 1921.

(Signed) Walter P. Temple."

(Testimony of Milton Kauffman)

Thereupon the witness resumed his testimony as follows:

"We enclosed in the letter to Standard Oil Company with our demand the original tax receipts for the year in question. I am familiar with the description of the Temple property and with the description set out in the lease. I have seen the lease. The county auditor's certificate showing the property assessed and paid for in 1920, which certificate is now shown to me, bears the number 342064. On the next page there is the number 333832. The two bills we included were the assessment numbers I have just given. The description in the certificate before me describes the outer boundaries of the Temple lease. The Temple lease is in one of the parcels. One is known as 701 and the other is the Rancho La Merced. One certificate described the Rancho La Merced, the other certificate Tract 701. The acreage is given separately. In the Rancho Tract 701 the acreage given is 5.633 and in the other the acreage is given as 48.97. I have compared the description on those respective parcels with the map to determine that they collectively describe the true boundaries of that lease. And the bill that we sent to the Standard and upon which we collected that two hundred odd dollars of money was bill describing the true boundaries of that property and which I said and Temple said was under the lease."

(Testimony of Milton Kauffman)

Thereupon plaintiff offered and there was received in evidence as Exhibits 9 and 10, respectively, the following documents:

Plaintiff's Exhibit No. 9

COUNTY OF LOS ANGELES
AUDITOR'S CERTIFICATE AS TO PAYMENT OF TAXES

Los Angeles, Calif. December 4 1934

I, H. A. Payne, County Auditor of Los Angeles County, do hereby certify that I am the custodian of the Tax Roll for the year 1920, and that the following described property was assessed to Walter P Temple

Vol. 109, page 119, Assessment No. 342064, assessed value $1410.00

Amount First Payment,	$14.46	Paid 12/6/20	
" Second "	$14.44	Paid 12/6/20	
" Penalty "	$.....	Paid.....	
		Total	$28.90

Description Tract #701 16/110-11 Maps 5.633 Acs com at most Ely cor of Lot 72 th N 73° 31′ W 1131.4 ft th N 62° 32′ E 510.70 ft th N 48° 12′ E 100 ft th S 41° 48′ E 836 ft to Beg Part of Lot 72

H. A. PAYNE, County Auditor.
By T. E. Tanner Deputy
H. C.

(Testimony of Milton Kauffman)

Plaintiff's Exhibit No. 10

COUNTY OF LOS ANGELES
AUDITOR'S CERTIFICATE AS TO PAYMENT OF TAXES

Los Angeles, Calif. December 4 1934

I, H. A. Payne, County Auditor of Los Angeles County, do hereby certify that I am the custodian of the Tax Roll for the year 1920, and that the following described property was assessed to Walter P. Temple

Vol. 106, page 280, Assessment No. 333832, assessed

P. P. 1915.00
value $13090.00

		45.00	P. P.
Amount First Payment,		$160.36	Paid 12/6/20
"	Second "	$160.34	Paid 12/6/20
"	Penalty "	$.....	Paid.....
		Total	$365.70

Description Rancho La Merced 48.97 Acs (Ex of Rd) com at intersection of Nly line of Ro La Merced with Wly line of Temple Road th N 73° 31′ W 1131.4 ft th S 74° 55′ 50″ W 604.52 ft th S 10° 43′ W 1225 ft th N 76° 17′ E 740 ft th S 84° 36′ 15″ E 1767.90 ft th N 7° 46′ E 150 ft to SWly line of Temple Road th NWly along said SWly line to Beg Part of Sec 6 Twp 2 ^{s} R 11 ^{w}

H. A. PAYNE, County Auditor.

By T. E. Tanner Deputy
H. C.

(Testimony of Milton Kauffman)

Thereupon the witness resumed his testimony as follows:

"I am familiar with the distinction between land taxes and mineral rights taxes. The letter dated October 11, 1921, now shown to me, bears the signature in my handwriting. The bill now shown to me, which has the caption, "Standard Oil Company Producing Department", charging Walter P. Temple and Laura G. Temple with a certain amount of money on account of the mineral tax, was received by me. In response to that I wrote the letter I now hold, at the direction of Mr. Temple and my own. The bill sent aggregates $9,959.35, which is 1/8th of the mineral tax."

Thereupon plaintiff offered and there was received in evidence, as Plaintiff's Exhibits 11 and 12, the following documents:

Plaintiff's Exhibit No. 11

Walter P. Temple
El Monte, California

Oct. 11
1921

Standard Oil Company, Producing Department,
San Francisco, Cal.

Gentlemen:

Enclosed you will please find my check for $9,959.35 in payment of the attached bill being my portion of the Los Angeles County taxes on mining rights assessed as personal property for the fiscal year 1921-1922.

(Testimony of Milton Kauffman)

This check was payable on October 15th so kindly deposit same at that time.

Thanking you for past favors, I remain,

Yours very truly,

Walter P. Temple,
By Milton Kauffman, Manager.

Plaintiff's Exhibit No. 12

124 (Oct. 1921)

STANDARD OIL COMPANY
PRODUCING DEPARTMENT

San Francisco, June 1921

Charge Walter P. and Laura G. Temple,
Address R. F. D. 1, Box 16 Our No.
El Monte, California. Your No.

Your portion of Los Angeles County
Taxes on Mining Rights assessed
as personal property for fiscal year
1921-1922

La Puente, In. School District
Valuation $1,246,100, Rate $1.90,
Tax $23,675.90 1/8 of above 2,959 48

(Testimony of Milton Kauffman)

La Puente, Out School District
Valuation $2,177,130, Rate $2.35,
Tax $51,162.55 1/8 of above 6,395 32

Potrero Hts. School District
Valuation $248,020, Rate $1.95,
Tax $4,836.39 1/8 of above 604 55

$9,959 35
J B 15/17/21

No. Eq 57-C Standard Oil vs. Nance et al. Plf Exhibit No. 12 Filed 2/12 1935 R. S. Zimmerman, Clerk By Cross Deputy Clerk

Thereupon plaintiff offered and there was received in evidence, as Plaintiff's Exhibit 13, the following documents:

No. 69390 For the Year 1921 Original To Be Given To Taxpayer

RECEIPT FOR COUNTY AND SCHOOL TAX
(And Municipal and Special Tax if Collected)

Collected by ASSESSOR OF LOS ANGELES COUNTY, CALIFORNIA on PERSONAL PROPERTY under Section 3820, Political Code.

Received of Standard Oil Co.
Address S O Bldg. San Francisco.
Location of Property c/o H. M. Whiteley

(Testimony of Milton Kauffman)

On account of County and Special School Tax (and Municipal and Special Tax if collected) 1921 on the following personal property, to-wit:

		$
Temple Lease		
57.77 acs. in Sec 6 Tp. 2 s R. 11 w		
Mining Right		2480 20
H. M. W.		
Total Assessed Value		
Exempt Personal Property		
Net Assessed Value		2480 20
	Rate	Tax
County, School and Special or Municipal if Collected	195	
L. A. City Municipal Annex		
L. A. City Municipal Imp. Dist. No.		
L. A. County Water Works Dist. No.		
[Stamped]: Audited H. B. W.		
Total Tax Collected		4836 39
Road Dist. No. 1		
School Dist. Potrero Hts		
		District.
		District.

This 30 day of June 1921

ED W. HOPKINS, County Assessor

By Handley, Deputy.

NOTE:—The tax rate for this collection may be changed in September by the Supervisors. (Sec. 3823-3824-3825 Pol. Code). If so, an excess or deficiency tax will result, which must be settled through the Tax Collector's Office.

(Testimony of Milton Kauffman)

No. 69388 For the Year 1921 Original To Be Given To Taxpayer

RECEIPT FOR COUNTY AND SCHOOL TAX
(And Municipal and Special Tax if Collected)

Collected by ASSESSOR OF LOS ANGELES COUNTY, CALIFORNIA on PERSONAL PROPERTY under Section 3820, Political Code.

Received of Standard Oil Co.
Address S O Bldg San Francisco.
Location of Property c/o H. M. Whiteley

On account of County and Special School Tax (and Municipal and Special Tax if collected) 1921 on the following personal property, to-wit:

	$
Temple Lease	
57.77 acs. in Sec 6 Tp 2 s R. 11 w	
Mining Right	21771 30

Approved
H. M. W.

(Testimony of Milton Kauffman)

Total Assessed Value

Exempt Personal Property .....

Net Assessed Value 21771 30

[Stamped]: Audited H. B. W.

	Rate	Tax
County, School and Special or Municipal if Collected	235	
L. A. City Municipal Annex		
L. A. City Municipal Imp. Dist. No.		
L. A. County Water Works Dist. No.		
Total Tax Collected		51162 55
Road Dist. No. 1		
School Dist. Temple La Puente		

District.
District.

This 30 day of June 1921

ED W. HOPKINS, County Assessor

By Handley, Deputy.

NOTE:—The tax rate for this collection may be changed in September by the Supervisors. (Sec. 3823-3824-3825 Pol. Code). If so, an excess or deficiency tax will result, which must be settled through the Tax Collector's Office.

(Testimony of Milton Kauffman)

No. 69384 | For the Year 1921 | Original To Be Given To Taxpayer

RECEIPT FOR COUNTY AND SCHOOL TAX
(And Municipal and Special Tax if Collected)

Collected by ASSESSOR OF LOS ANGELES COUNTY, CALIFORNIA on PERSONAL PROPERTY under Section 3820, Political Code.

Received of Standard Oil Co.
Address S. O. Bldg San Francisco
Location of Property c/o H. M. Whiteley

On account of County and Special School Tax (and Municipal and Special Tax if collected) 1921 on the following personal property, to-wit:

	$
Temple Lease	
59.77 acs. in Sec. 6 Tp. 2 s R. 11 w	
Mining Right	12461 00

Approved
H. M. W.

(Testimony of Milton Kauffman)

Total Assessed Value		
Exempt Personal Property		
Net Assessed Value		12461 00
	Rate	Tax
County, School and Special or Municipal if Collected	190	
L. A. City Municipal Annex		
L. A. City Municipal Imp. Dist. No.		
L. A. County Water Works Dist. No.		
Total Tax Collected		23675 90

[Stamped]: Audited H. B. W.

Road Dist. No.

School Dist. La Puente in Montebello Cy District.

District.

This 30 day of June 1921

ED W. HOPKINS, County Assessor

By Handley, Deputy.

NOTE:—The tax rate for this collection may be changed in September by the Supervisors. (Sec. 3823-3824-3825 Pol. Code). If so, an excess or deficiency tax will result. which must be settled through the Tax Collector's Office

(Testimony of Milton Kauffman)

Thereupon the witness resumed his testimony as follows:

"I talked to Mr. Temple about the forty-foot strip when the Unruh deed was in escrow. After the execution of the lease to Kent I had knowledge that the Kent lease contained that forty-foot strip clause. When we were paying the tax or exacting a tax from Standard on the basis of a full description, the subject of the forty-foot strip was never brought up to my knowledge. I did not hear anybody claim that the forty-foot strip clause constituted an exception of the strip itself."

Upon cross-examination said witness testified that Mr. Temple wanted to buy about sixty (60) acres from the Baldwin Estate; that the actual amount of land covered by the deed was 58.13 acres, including both the La Merced Rancho and Tract No. 701; that he never had any power of attorney from Mr. Temple; that he was employed by Mr. Temple for a fixed amount; that at the time the lease was written he was Mr. Temple's agent and authorized to act for him.

Upon redirect examination the witness testified as follows:

'The certified copy of the auditor's certificate for the taxes levied against the Temple property for the year 1915 now shown me, which was prior to the making of any lease in this case, accord with the boundaries of the Temple lease. The acreage on 701 is given as 5.633 and the acreage assigned to the Rancho La Merced is 49.75. The aggregate there of the acreage before any lease was

made was approximately 55 plus acres. Later the acreage, while within the same description of outer boundaries, was given in greater area on account of a variance in the subsequent survey. It is all comprised in the outer boundaries."

Thereupon plaintiff offered and there was received in evidence Plaintiff's Exhibit 14, as follows:

COUNTY OF LOS ANGELES
AUDITOR'S CERTIFICATE AS TO PAYMENT OF TAXES

Los Angeles, Calif January 14 1935

I, H. A. Payne, County Auditor of Los Angeles County, do hereby certify that I am the custodian of the Tax Roll for the year 1915, and that the following described property was assessed to Walter P. Temple

Vol. 63, page 214, Assessment No. 259435, assessed

$4900.00 Land
value 850.00 Imp
80.00 P. P.

1.74 P. P.

Amount First Payment,	$62.68	Paid 4/14/16	
" Second "	$62.67	Paid 4/14/16	
" Penalty "	$ 9.66	Paid 4/14/16	
		Total	$136.75

(Testimony of Milton Kauffman)

Description Rancho La Merced 1/73 L. S. 49.75 Acs com at S E cor lot 72 Tr #701 th N 73° 31′ W 1131.4 ft th S 74° 55′ 50″ W 604.62 ft th S 70° 43′ W 1225 ft th N 76° 17′ E 740 ft th S 84° 38′ 10″ E 1767.0 ft th N 7° 46′ E 150 ft th N 28° 7′ 15″ W 785.35 ft to Beg in Sec 6 Twp 2 s R 11 w and Personal Property

H. A. PAYNE, County Auditor.
By T. E. Tanner Deputy
H. C.

COUNTY OF LOS ANGELES
AUDITOR'S CERTIFICATE AS TO PAYMENT OF TAXES

Los Angeles, Calif January 14 1935

I, H. A. Payne, County Auditor of Los Angeles County, do hereby certify that I am the custodian of the Tax Roll for the year 1915, and that the following described property was assessed to Walter P. Temple

Vol. 77, page 151, Assessment No. 303316, assessed value $420.00

Amount First Payment,	$3.70	Paid 4/14/16	
" Second "	$3.69	Paid 4/14/16	
" Penalty "	.55	Paid 4/14/16	
		Total	$7.94

Description Tract #701 16/110-11 Maps 5.633 Acs com at most Ely cor lot 72 th N 41° 48′ W 836 ft th S 48° 12′ W 100 ft th S 62° 32′ W 510.70 ft th S 73° 31′ E 1131.4 ft to Beg Being Part of Lot 72

H. A. PAYNE, County Auditor.
By T. E. Tanner Deputy
H. C.

(Testimony of Milton Kauffman)

Thereupon the witness resumed his testimony as follows:

"Just prior to the making of the lease on August 11, 1915, Mr. Temple made a grant of an easement to the County of Los Angeles for road purposes. I recall the giving of the deed, of which a certified copy is shown me, being a deed from Walter Temple to the County of Los Angeles of a strip of land 33 feet wide on each side of the center line. That deed was for a continuation of Lincoln Avenue."

Thereupon plaintiff offered and there was received in evidence Plaintiff's Exhibit 15, as follows:

"BOOK NO. 6123, PAGE NO. 178 OF DEEDS
DEED

For a Valuable Consideration, The undersigned W. P. Temple and Mrs. W. P. Temple do hereby grant to The County of Los Angeles, for public road and highway purposes, the following described real property situated in the said County of Los Angeles, State of California, A strip of land sixty (60) feet in width, being a portion of the property of W. P. Temple located in Rancho La Merced, as shown on County Surveyor's Map Number 3603 on file in the office of the County Surveyor of said County; said strip of land lying thirty (30) feet on each

(Testimony of Milton Kauffman)

side of the following described center line, to wit: Beginning at a point in the Southerly line of the said property of W. P. Temple, said point being distant N. 84° 36′ 15″ W. 585.20 feet from a 1 by 2 stake at the southeast corner of the said property of W. P. Temple; Thence N. 38° 24′ 30″ East 82.41 feet to a point; thence N. 19° 28′ 30″ East 190.77 feet to a point; thence N. 21° 26′ 45″ East 127.28 feet to a point; thence N. 41° 03′ 30″ East 179.37 feet to a point in the southwesterly line of San Gabriel Boulevard, and bearing S. 28° 05′ East 431.89 feet from an angle point in the westerly line of said Boulevard. Said strip of land containing 0.799 Acres more or less. Reference is hereby made to County Surveyor's Map Number 7996 on file in the office of the Surveyor of said County.

It is understood that each of the undersigned grantors grants only that portion of the above described parcel of land which is included within land owned by said grantor or in which said grantor is interested.

In Witness Whereof, I have hereunto set my hand this 8th day of April, 1915.

Witness Signature W. P. Temple.) Mrs. W. P. Temple.
)
W. T. Bender, Atty-at-Law. 510) W. P. Temple.
Equitable Bk. Bldg.)

(Testimony of Milton Kauffman)

State of California, County of Los Angeles) ss.

On this 8th day of April, 1915, before me, Charles Soward, a Notary Public in and for said County and State, personally appeared Mrs. W. P. Temple known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

Witness my hand and official seal the day and year first above written.

(Notarial Seal) Charles Soward,
Notary Public in and for said County and State.

State of California, County of Los Angeles) ss.

On this 23rd day of June, in the year nineteen hundred and fifteen, A. D., before me, Francis D. Adams, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. P. Temple, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Notarial Seal) Francis D. Adams,
Notary Public in and for Los Angeles County, State of California.

(Testimony of Roy C. Gunn)

Minutes, Vol. 54 Page 133 Road Book, Vol 16 Page 218. Approved as to Form A. J. Hill, County Counsel By Hugh Gordon, Deputy. Description Approved Jun. 24, 1915, I. B. Noble, County Surveyor, By Albert E. Timmons, Deputy. #66. A full true and correct copy of original recorded at request of Supervisors Sep. 20, 1915, at 32 min. past 10 A. M. #170. Copyist #27. C. L. Logan, County Recorder, By L. Bond, Deputy."

ROY C. GUNN

was next called as a witness for plaintiff and testified as follows:

"I am in the employ of the Standard Oil Company of California. I was connected with the old company, the Standard Oil Company, since 1907 as engineer and division engineer later. I am familiar with the property known as Baldwin and Temple leases. I made a survey of the anticline across the property in 1915, at the direction of my superior, the superintendent. After making the map I delivered it to Mr. Schmaller, my superior. Thereafter Standard took leases on the Temple and Baldwin property. I traced out the locations for the wells and made the locations quite close to the anticline to the south. I have been in close touch with the leases ever since and the conditions. Standard has been in constant possession. Oil and gas have been produced during the years from the time of first discovery. The map now shown me, which is an enlargement of a map annexed to the complaint, truly represents the two leases and the locations of the wells thereon. The line drawn in red ink thereon indicates the anticline as I surveyed it."

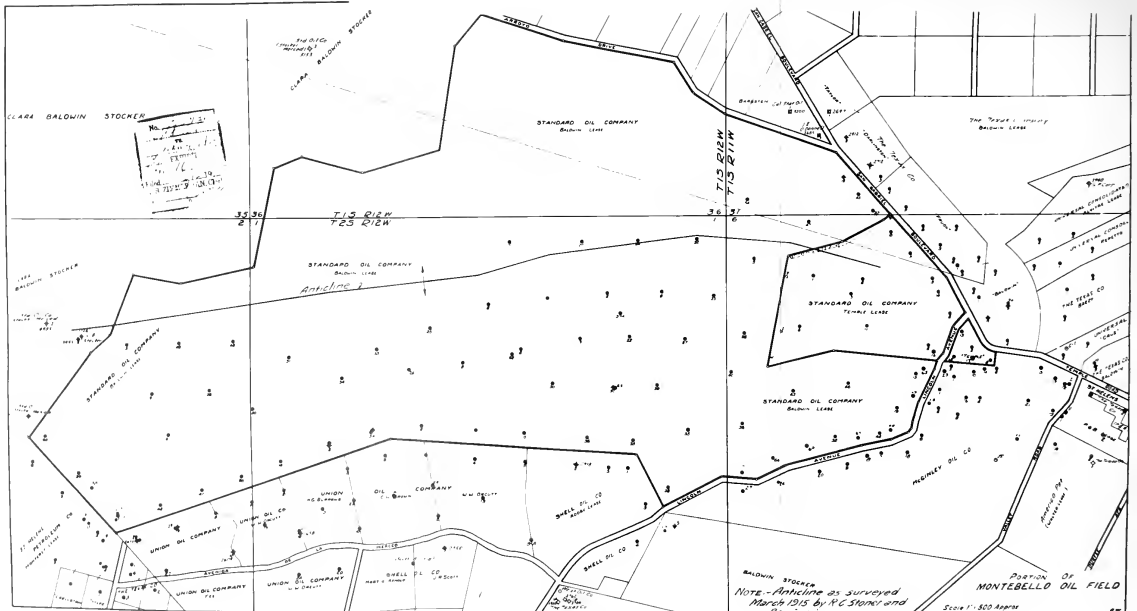
(Testimony of Roy C. Gunn)

Thereupon plaintiff offered and there was received in evidence, as Plaintiff's Exhibit 16, a map showing in red ink the anticline testified to by the witness, crossing the forty-foot strip, said map being as follows:

(Map.)

Thereupon the witness resumed his testimony as follows:

"As I made my survey in March, 1915, I made field notes. I observed fences. There was a fence along the northwesterly side of Temple, along the westerly side. Along the westerly side is a portion running from the westerly side up to San Gabriel Boulevard. That anticline crosses the fence and I made a note of the fence in my book. There was a fence on the westerly side. From time to time thereafter I went back on the Baldwin and Temple leases to make surveys and had quite a bit to do with the installation of facilities for the development of two properties. I ran pipe lines. Standard put pipe lines in in rows, appropriating the entire surface of the forty-foot strip. Standard also put power lines through the strip. These were put in from the time we started de-


CLARA BALWIN STOCKER
STANDARD OIL COMPANY
BALDWIN LEASE
T13 R16W
T13 R15W
T13 R14W
T13 R13W
T13 R12W
T13 R11W
32 36
31 6
Anticline
STANDARD OIL COMPANY
TEMPLE LEASE
THE TEXAS CO
UNION OIL COMPANY
SHELL OIL CO
McKINLEY OIL CO
WORKMAN AVENUE
WORKMAN MILL ROAD
WHITTIER BOULEVARD
BALDWIN STOCKER
Note - Anticline as surveyed March 1916 by H.C. Stoner and R.L. Gunn
PORTION OF MONTEBELLO OIL FIELD
Scale 1" = 800 Approx

(Testimony of Roy C. Gunn)

velopments about 1917. I never heard of anybody disputing the right to do that. Standard did these things openly. There is a power plant located right in the northwest corner close to the Baldwin and Temple used for development. I observed roads. There is a road just south of the fence extending clear down to the Boulevard. When the property was first leased there was just a traveled road along that line. Later on it was improved by Standard Oil and widened and graveled. As so improved and so extended, it ran about 12 or 15 feet from the fence on the northwesterly side. That would be on the forty-foot strip. There were pipe lines running across the strip on the Western side which were visible on the ground. There is a ravine and they cross right across the ravine. They are visible to anybody going upon the property for years ever since they were put in ten or twelve years ago. The power lines were constructed by the Standard Oil Company upon the property and required the setting of poles. On the west side some of those poles rest on the forty-foot strip and have since installation."

Upon cross-examination said witness testified that this road was improved for the Company's use and that in running the pipe and power lines he assumed the Company had the right to run them across the strip.

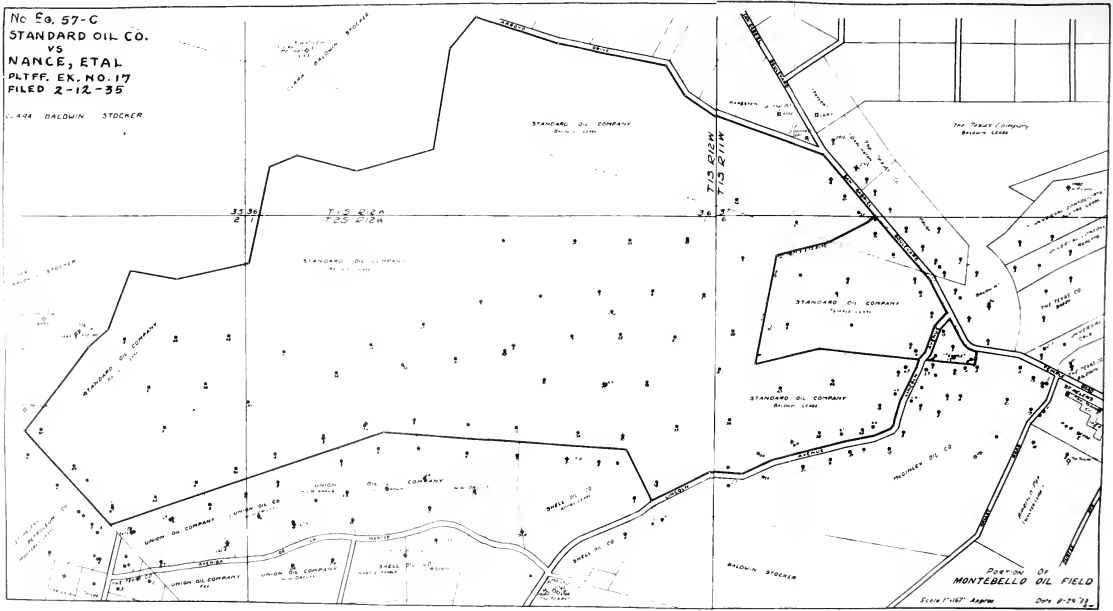
(Testimony of Roy C. Gunn)

The plaintiff thereupon offered and there was received in evidence as Exhibit 17, a map showing the location of certain oil wells upon the Baldwin and Temple leases and the distances of said wells, from the forty foot strip, to be as alleged in the complaint, said map, Exhibit 17, being as follows:

There is hereby at this point incorporated herein by reference and hereby made a part hereof as fully as if set forth in full Plaintiff's Exhibit 17; said Exhibit 17 to be set forth in full herein in the transcript to be prepared and filed in this cause.

It was stipulated between the plaintiff and defendants that if witnesses produced by the plaintiff were called to the stand they would place the wells on the map as shown by the map.

It was then stipulated between the plaintiff and defendants that if a witness produced by the plaintiff was called to the stand he would testify that the sands underlying the two leases were predominately coarse sands, offering a minimum of resistance, and that the drainage area of oil under that condition of sand would be in excess of four hundred feet, and that if another witness for plaintiff was called, he would testify that the anticline indicates a ridge or an upper crust of rough strata and to the oil man it is significant in that it indicates a cavity underneath in which is gas and oil and other hydrocarbons.


No Eq. 57-C
STANDARD OIL CO.
vs
NANCE, ETAL
PLTFF. EX. NO. 17
FILED 2-12-35
CLARA BALDWIN STOCKER
T.13 S.R.12W
T.13 S.R.11W
T.12 S.R.11W
T.12 S.R.12W
35 36
2 1
36 31
6
STANDARD OIL COMPANY
BALDWIN LEASE
STANDARD OIL COMPANY
TEJUNGA LEASE
STANDARD OIL COMPANY
BALDWIN LEASE
STANDARD OIL COMPANY
UNION OIL COMPANY
UNION OIL CO
SHELL OIL CO
SHELL OIL CO
MCKINLEY OIL CO
THE TEXAS COMPANY
BALDWIN LEASE
THE TEXAS CO
BALDWIN STOCKER
PORTION OF
MONTEBELLO OIL FIELD
Scale 1"=1187' Approx
Date 8-29-35

(Testimony of Walter A. Brown)

WALTER A. BROWN

was next called as a witness for plaintiff and testified as follows:

"I am familiar with the Temple and Baldwin properties. I was superintendent for Standard Oil Company from 1923 to 1932 on the Baldwin and Temple leases and was on the leases constantly. As to fences I observed that the property was fenced all the way up around San Gabriel Boulevard when I went there and the Arroyo Road. On the lease proper there were fences from a portion of a fence on the San Gabriel Boulevard to a portion southwest up the hill from the Boulevard on the northwest corner. There are roads over all of Baldwin property. We used to go from the Baldwin over on to the Temple. We would go up the Arroyo and drive along down through the Baldwin on a road there and cross into the Temple. The road crossed close to where Baldwin's 5 is located."

Thereupon it was stipulated between the plaintiff and defendants that Standard Oil Company operated the two leases in conjunction, that is, together, and freely went across the strip without asking permission from anybody or without recognizing any superior ownership other than the original right of way.

Thereupon the witness resumed his testimony as follows:

"During the years I was there as superintendent I put such roads and did such things across that right of way as was reasonably necessary for the development of the

property for the benefit of the Standard Oil Company. The road was in when I went there. After I went there it was necessary to repair the roads all the time, to gravel them and to put on some oil. Nobody impeded me in my operations there or resisted me in any way or questioned my right to do that. It was my understanding we were to have one entrance to the property and we found the gate open from time to time. There was a chain and lock on it and they cut the chain or broke the lock so we went down and set a post in the center between the two gate posts so that if they did open the gate they couldn't drive through. I caused that to be done. The boiler plant was torn down when I went there but the remains were still there, a lot of old brick and some pipe. Its original location was right on the line between the two properties. It crossed the line pretty well on each and partly on the forty-foot strip. That boiler plant was used in developing both on the Baldwin and the Temple leases."

On cross-examination the witness testified that he saw the forty-foot strip used as a roadway up on top of the hill and down and that this was used by the Standard Oil Company all of the time, but that the roadway did not extend down to San Gabriel Boulevard; that the roadway followed the boundary for 15 or 20 feet; that the gate was closed there; that the roadway used ran along the boundary line at the top of the ridge and down to Lincoln Boulevard; and that there were roads maintained and used at various places over the property.

(Testimony of George C. Seeger)

GEORGE C. SEEGER

was next called as a witness for plaintiff and testified as follows:

"I worked for Standard Oil Company in 1917 and was quite familiar with the Baldwin and Temple leases. I was assistant superintendent and examined the property in a general way. There were roads from the Baldwin to the Temple following the ridge to the Temple. At that time they would not be definitely laid out. The ground was level enough to drive over without a direct road. They were later improved by Standard and were staked and graded. I observed this, where the road entered from Baldwin into the Temple. It continued in a northwesterly direction toward the San Gabriel Boulevard. The road was maintained right along while I was there. Where it went into the Temple there was a fence along that line. That fence dividing the Temple and Baldwin was very close to the road at the top of the hill, at Temple No. 1, then it led out into the Temple from there about half way down and back to the fence again before it got to San Gabriel. Further down I think it touched the fence very close. I would not say that at any time any place on that course down to San Gabriel Boulevard it was in excess of forty feet from the fence."

It was thereupon stipulated between the plaintiff and defendants that the defendant Nance on or about August 26, 1933, acting by and through his agents and servants entered upon the forty foot strip in question and by means of motor trucks deposited thereon certain sand,

(Testimony of Walter P. Temple)

gravel, cement, and water together with tools and other apparatus for the making of excavations and constructing concrete corner posts for an oil derrick, and thereupon proceeded and caused locations to be made and staked the ground.

WALTER P. TEMPLE

was called as witness for defendants and testified as follows:

That he was the person named in the lease to Mr. Kent, hereinbefore set forth; that he acquired the property covered by the lease from the Baldwin Estate and that Mr. Unruh was the Executor of said estate and executed the deed; that Mr. Kent broached the subject to him that the latter was desirous of getting a lease on the property; that Mr. Kent did not mention to him that he was connected with or representing or acting on behalf of the Standard Oil Company; that the witness thought Mr. Kent was acting for himself in acquiring the lease; that the first time he saw the lease was in 1915 when he made it, and he thought it was brought to him by Mr. Kauffman; that he did not prepare it and at no time employed an attorney by the name of Roberts; that during the negotiations for the lease Mr. Kent at no time told him or mentioned the subject, that he would not take the lease unless he could also acquire a lease on the Baldwin property.

That his understanding of the sense in which the wording was used in the clause in the deed respecting the forty foot strip was that the forty foot strip should be used for a road and, therefore, "he" had no control over it.

(Testimony of Walter P. Temple)

That his understanding of the sense in which the wording was used in the clause in the lease respecting the forty feet strip was that the forty foot strip was to be excluded from the lease; that he had no authority to make any lease or conveyance of that property, for the reason that under the Baldwin deed to him from Mr. Unruh, he was enjoined from doing anything in the way of leasing the strip, and that the Baldwin Estate required of him at some future time to reconvey that strip, if the road should ever go through, and for that reason he thought he had no right to make a lease on that portion of the premises.

Upon cross-examination Mr. Temple testified that it was his understanding that in the Unruh deed the fee to the forty foot strip was retained by the Baldwins; that when the deed was made he took it up with his attorney, General Johnson Jones, and that he had told him that he had no right to lease that particular strip of land because he was a straight custodian on behalf of the Baldwin people, that Mr. Temple did not own the property, that he could not lease it and that was his interpretation of the deed; that he consulted with his attorney after the deed was delivered to him. That he based his statement, upon direct examination, to the effect that he would have to reconvey the property upon the request of the Baldwins, upon the fact that if at any time the road was made and dedicated to the County as a highway, Mr. Unruh's deed to him demanded that the grantee should jointly make a deed or convey the property back. He also testified that he was familiar with dedications, and that they could be made by filing a map platting a street from the map, and

that he had conveyed an easement for road purposes to the County in April, 1915, with respect to Lincoln Avenue, and that he knew this could be done by a deed granting an easement only; that although he knew it was not necessary for him to reconvey the property to the Baldwins upon their request for road purposes, he didn't know it at the time; that he supposed that the fee to the forty foot strip was in the Baldwins, and that if the road would be dedicated he would have to give his consent to the Baldwin's, but that if the fee was retained by the Baldwins he would not have anything to consent to.

That he later made the lease to Kent and his explanation of the reason why the lease described the outer boundaries of the land and included the forty foot strip, was that the portion on the west side was a strip of land forty feet wide its full length, to be used for a road, and of course, it might—from Mr. Kent's that road would be clear—that was a reservation; it was his intention not to include that strip in the body of the deed, that is including two acres wherever it may be from the other; that he thought he was acquiring fifty-seven (57) or fifty-eight (58) acres; that he always spoke of the tract as the sixty (60) acre tract; that he assumed the sixty (60) acre tract covered everything, including the road; that he dealt with that property as if it were his own, and as if it were all within the sixty (60) acre parcel; that he acquired from the Baldwins an area which he thought was sixty (60) acres, and he assumed that sixty (60) acres was within the outer boundaries described in the Unruh deed; that he did not intend to lease the entire sixty (60)

(Testimony of Walter P. Temple)

acres to Kent, not the roadbed, but that Mr. Kent did acquire the sixty (60) acres, the entire acreage.

That the letter dated November 16, 1918, Plaintiff's Exhibit 18, was executed by him; that he was not familiar with the provision in the lease respecting the payment of the mineral tax, but that he knew the forty foot strip provision in the lease was intended for a road, and left the provisions respecting the mineral tax to his associates, Mr. Kauffman and Mr. Woodward; that he had signed checks for his one-*eight* portion of the taxes on the demand of the Standard Oil Company.

Thereupon plaintiff offered and there was received in evidence Plaintiff's Exhibit 18, reading as follows:

Office of
WALTER P. TEMPLE
Oil Properties
Milton Kauffman, Manager

El Monte, Cal. November 16, 1918

Standard Oil Company
San Francisco, California

Dear Sirs: As I have not received a statement from the County Tax Collector I am writing you to find out that the payment I made you of $1159.36 on July first of this year included all the real and personal taxes on the 60 acres you have under lease from me. Kindly look this matter up and let me hear from you as soon as possible, as the taxes are delinquent the end of this month.

Truly yours,

WPT/MK. (signed) Walter P. Temple

(Testimony of Walter P. Temple)

Resuming his cross-examination, the witness testified:

That Mr. Kauffman used to be his representative and did all of his work; he never had to bother about business.

That his conclusion that Mr. Kauffman prepared and brought the Kent lease to him was reached because Mr. Kauffman was attending to his affairs, and that he had no independent recollection that Mr. Kauffman did so.

That he recalled the lease to Mr. Levy; that he recalled saying to Mr. Kent that there was a lease upon the property and it was about to be cancelled and that perhaps he had handed Mr. Kent a copy of the Levy lease; that he didn't recall Mr. Kent telling him that he was acquiring the property in the interest of the Standard Oil Company, and that he was also negotiating with the Baldwins for a lease; that he told Mr. Kauffman to give the lease to Mr. Kent; that he, Temple, showed the Levy lease to Mr. Kent; that it was a fact that after acquiring the property from the Baldwins he paid taxes upon the entire area, included within the outer boundaries, and that after the lease was made and his taxes were increased over what they were during the year before the lease was made upon the same territory or property, he sent to and collected from Standard a portion of that increase; that he was familiar with what was being done and signed the receipts and that the signature on plaintiff's Exhibit 8 was his signature.

Upon redirect examination, Mr. Temple testified that it was his understanding that the purposes to which he could put the surface of the forty foot strip until called

(Testimony of Walter P. Temple)

upon to enter into the construction of a road upon it, was grazing and farming, and transportation, and that he built a road upon the forty foot strip from San Gabriel Boulevard, but if called upon by the Baldwin heirs to enter into a deed for a road, he would have had to cease such use.

Whereupon defendants introduced in evidence as Defendants' Exhibit A, a certified copy of the following document, executed and delivered by the parties thereto:

"SUPPLEMENTAL AGREEMENT

This Supplemental Agreement, made the First Day of November A. D. 1917, between Walter P. Temple and Laura G. Temple, his wife, of El Monte, California, first parties and Standard Oil Company, a Corporation under the laws of the State of California, second party, Witnesseth, That Whereas the first parties heretofore on the Eleventh day of August, 1915, entered into a certain lease and agreement with J. M. Kent of Bakersfield, California, which said lease and agreement is dated August 11, 1915 and was recorded November 9, 1915 in Book 106, Page 39 of Leases, Records of Los Angeles County, California and Whereas, said lease and agreement were, by said J. M. Kent, thereafter transfered and assigned to said Standard Oil Company, the second party herein and

Whereas in said lease and agreement dated August 11, 1915, there was excepted from the premises described therein, a certain portion of the tract described,

Now, in consideration of the sum of Five Thousand Dollars ($5,000) Gold coin of the United States, to the

first parties by the second party in hand paid, the receipt whereof by the first parties is hereby acknowledged, the first parties do hereby lease, let and demise unto the second party the portion of the premises excepted from the provisions of said lease and agreement of August 11, 1915 (excepting only the strip of land excepted for road purposes) with the same rights unto the second party therein, thereon, thereunder and thereover, upon which the second party holds said premises which are the subject of said lease and agreement dated August 11, 1915 it being the intent hereof that said excepted portion shall be deemed to be included in said lease and agreement of August 11, 1915, as if the same had never been excepted from the description of the premises which are the subject of said lease and agreement of August 11, 1915.

The first parties further agree that said second party shall have the exclusive use of all buildings and structures now on the premises described in said lease and agreement of August 11, 1915 and heretofore used by the first parties, as well as all buildings and structures on said excepted portion of said premises which is the subject of this supplemental agreement, and said buildings and structures, and all of them are hereby leased unto and demises unto said second party, without the payment of further rents, so long as said lease and agreement of August 11, 1915 shall be in effect as to the premises therein and herein referred to or to any part thereof.

The first party further agrees that the second party shall have the exclusive use, free of charge, of the water well now on the excepted portion of the premises described in said lease and agreement of August 11, 1915, which was drilled by the first parties, so long as said lease and

agreement shall be in force and effect, with the right to use the water therefrom, on or off the premises.

Whereas the parties hereto did, on the 16th day of July, 1917 enter into a certain agreement, which agreement was recorded July 24, 1917 in Book 110, Page 298 of Leases, Records of Los Angeles County, California, pursuant whereto certain water rights were leased to the second party on the Premises therein described, being a part of the premises which are the subject of this supplemental agreement and pursuant whereto the second party did agree to make certain rental payments.

It is further agreed in consideration of the payment above mentioned that said agreement of July 16, 1917, in respect to the payment of rents, shall be and the same is hereby abrogated, and that the second party may take the water developed by it on any part of any of the lands included in said agreement and lease of August 11, 1915 and/or on the lands hereby included in said lease, free of rental or charges for use on or off said lands if the said second party desires.

IN WITNESS WHEREOF the first parties have executed this supplemental agreement, the day and year first above written, and the second party has caused its corporate name and seal to be hereunto affixed by its officers thereunto duly authorized by its Board of Directors.

WALTER P. TEMPLE
LAURA G. TEMPLE
STANDARD OIL COMPANY,

(Corporate Seal) By F. H. Hillman
Vice President

By S. G. Hanson
Assistant Secretary"

Thereafter defendants introduced into evidence as their Exhibit "B" the following quitclaim deed:

"QUITCLAIM DEED

I Walter P. Temple, a widower, for the consideration of Seventy Five Dollars a month, do hereby remise, release and forever quitclaim to Lawrence V. Lewis and Evelyn L. Horton, all of my right, title and interest, ~~both~~ ~~personal and real,~~ in and to that ninety-four [W. P. Temple G L L] acres, more or less, known as the Workman Homestead, or Temple Ranch, located on Valley Boulevard near Puente, California, and also the entire parcel of land, to the utmost limits thereof described in that deed from H. A. Unruh executor of the last Will and Testament of Elias J. Baldwin to Walter P. Temple, which said deed was duly filed for record and now appears of record in Book 5193, Page 239 of *Deed*, Los Angeles County Records, containing sixty acres, more or less, located near Montebello, California, described as that part of Lot Seventy-two of Tract Number Seven hundred one in the County of Los Angeles, State of California as per Map recorded in Book 16, Pages 110 and 111 of Maps in the office of the County Recorder of said County and State, also that part of the Rancho La Merced, also in the aforesaid deed, in the County and State above mentioned, as per Patent recorded in Book 13 page 16 of Patents in the office of the County Recorder of said County and State, with no exceptions or reservations thereto whatsoever. The payments specified above are to continue to and including the month of June 1935.

Witness my hand and seal this 10th., day of June 1933

WALTER P. TEMPLE

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

On this 10th day of June, A. D., 1933 before me, Geo. L. Lower, a Notary Public in and for said County and State, personally appeared Walter P. Temple, known to me, (or proved to me on the oath of), to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) GEO. L. LOWER
Notary Public in and for said County and State."

Next the defendants introduced into evidence, as their Exhibit "C", the following quitclaim deed:

"QUITCLAIM DEED

WHEREAS, on the first day of October, 1912, H. A. Unruh, Executor of the Last Will and Testament of Elias J. Baldwin, deceased, did make, execute and deliver unto WALTER P. TEMPLE, a grant, bargain and sale deed and conveyance to a certain sixty acres of land, more or less, and being a part or portion of Lot 72, Tract 701, as per map recorded in Book 16, pages 110 and 111 of Maps, Records of Los Angeles County, California, also a portion of Rancho La Merced, as per patent recorded in Book 13, page 16 of Patents, Records of Los Angeles County, California, a more particular description of which said sixty acres is contained in said deed which was duly filed for record and now appears of record in Book 5193,

page 239 of Deeds, Los Angeles County Records, which said deed requires from the grantee therein for himself, his heirs and assigns, on demand, to join with said grantor, his successors or the owners for the time being in dedicating to and for public highway purposes a strip of land of a uniform width of forty feet immediately along and adjoining on the easterly and southeasterly side of the entire length of the westerly and northwesterly boundary line of the two parcels of land therein conveyed.

NOW, THEREFORE, I, Anita M. Baldwin, do hereby quitclaim, remise and release unto LAWRENCE V. LEWIS and EVELYN L. HORTON all aforesaid roadway rights reserved unto said deed from H. A. UNRUH to WALTER P. TEMPLE.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of June, 1933.

ANITA M. BALDWIN.

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles.)

On this 8th day of June, 1933, before me, the undersigned, a Notary Public in and for said County, personally appeared ANITA M. BALDWIN, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same.

WITNESS my hand and official seal.

(SEAL) RAYMOND L. KINSLEY

NOTARY PUBLIC in and for the County of Los Angeles, State of California."

Defendants next introduced into evidence as their Exhibit "D" a quitclaim deed in the same form and contents as the deed first above set forth, executed, however, by Rosebudd Doble Mullender and Albert E. Snyder, and dated June 8, 1933.

Next, defendants introduced into evidence, as their Exhibit "E", a quitclaim deed dated June 16, 1933, executed by Walter P. Temple to Lawrence V. Lewis and Evelyn L. Horton, describing and relating to real property described in the lease and deed hereinbefore set forth by metes and bounds description of the outer boundaries thereof, and which quitclaim deed contained the following:

"Including that certain strip of land of a uniform width of forty feet immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and northwesterly boundary line of the above described parcels of land reserved for road purposes in that certain deed from H. A. Unruh, Executor of the Estate of Elias J. Baldwin, deceased, to Walter P. Temple, recorded in Book 5193, page 239 of Deed Records of Los Angeles County, California."

Defendants next introduced into evidence, as their Exhibit "F", a copy of the oil and gas lease entered into by and between defendants Lawrence V. Lewis and Evelyn L. Horton, as lessors, to M. K. Nance, the 29th day of May, 1933, annexed to the complaint herein as Exhibit "D", which lease described and related to the forty foot strip hereinbefore referred to.

PLAINTIFF'S REBUTTAL

Plaintiff then called

MILTON KAUFFMAN

as a witness in rebuttal, who testified as follows:

That after the execution of the lease hereinbefore referred to, from Mr. Temple to Mr. Kent, Mr. Temple was living on San Gabriel Boulevard on the two-acre strip portion purchased from the Baldwin Estate; that he lived there until the end of 1917; that after such time Mr. Temple constructed a brick office building at the intersection of Lincoln and San Gabriel Boulevards, for conducting Mr. Temple's business; that he, Mr. Kauffman was in charge of that office and was there every day beginning about the first part of 1918 and continuing until 1927; that Mr. Temple would come to this office sometimes every day and sometimes once a week; that Mr. Temple would sometimes go on the property leased to Standard Oil Company and that Mr. Kauffman observed the activities all over the lease, including right up to the fence line; that Standard Oil Company were drilling wells, putting in a boiler plant, fences, pipe lines and buildings and there was no appearance of a reservation of any portion of the area along by the fence.

Upon cross-examination said witness testified that the Standard Oil Company did not drill on the forty foot strip; that they placed a boiler plant to furnish power for one of Temple's wells and one of Baldwin's wells which

(Testimony of William L. Haker)

was a quite a few hundred feet away from the forty foot strip, about two hundred feet.

Upon redirect examination the witness testified that he knew General Johnson Jones; that he was Mr. Temple's attorney; that the lease was not prepared as Mr. Kent testified he thought, by an attorney of Mr. Temple's, named Roberts; that Mr. Temple did not have such an attorney; that the lease was prepared in Mr. Jones' office; that prior to its preparation Mr. Kent came to Mr. Kauffman's office several times and went out to see Mr. Temple and that certain changes were desired to be put into it different from the Levy lease; that Mr. Temple, Mr. Kent and Mr. Kauffman talked the lease over in a general way and took the papers up to Mr. Jones' office; that Mr. Kauffman then went to San Francisco and when he came back Mr. Temple told him that it was signed and everything satisfactory.

The plaintiff then called

WILLIAM L. HAKER

as its witness in rebuttal, who testified as follows:

That he was and had been in the employ of the Standard Oil Company since 1920; that he was a graduated and practicing engineer; that he was at the present time in the Land Leasing Department of Standard Oil Company; that he had seen the lease from Mr. Temple to Mr. Kent and had noted the outer boundaries of the lease as described therein by metes and bounds; that he had directed the preparation of and caused to be prepared a map reproducing the outer boundaries of the lease and attempt-

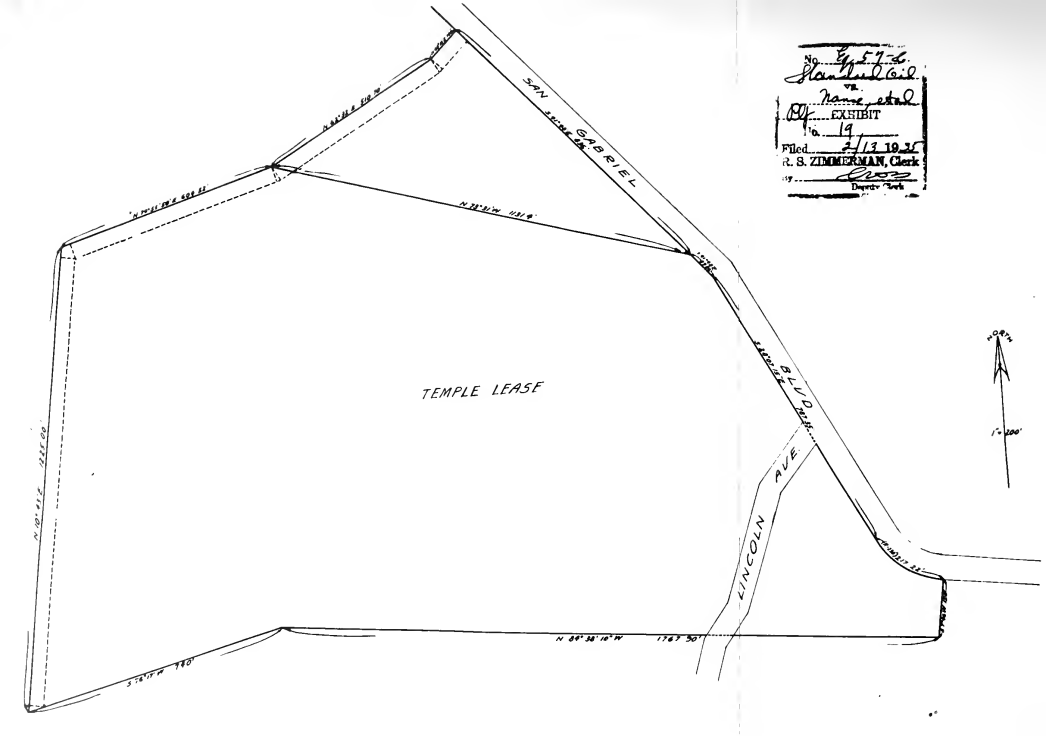
ing to allocate or at least to run a forty-foot strip of uniform width along those outer boundaries, and that the paper he held in his hand was the one that was made under his direction and that he knew it to be correctly done.

Thereupon plaintiff offered and there was received in evidence as Plaintiff's Exhibit 19, the following map:

(Map.)

Upon cross-examination, said witness testified that said exhibit showed the length of the outer boundary of the Temple property but did not show the length of the inside line of the forty foot strip, that said two lengths would not be the same, the inside line being shorter, in some cases it would be shorter and in some cases longer, depending upon the direction; that the bearings on each line would be the same, assuming that the inner boundary was about parallel to the outer bounary, but the length of the lines would depend on whether the angle went to the right or the left; that strictly speaking, there could not be a strip of uniform width, that is, forty feet wide at all points, unless the courses were one straight line and terminate in lines at right angles to that boundary, and in view of the fact that there were angles on the outer boundary, there would be places where there would not be a uniform width of forty feet and, therefore, resulting in unequal lengths.

It is hereby stipulated that the above and foregoing statement of evidence, together with Plaintiff's Exhibit No. 17, which is incorporated therein by reference and


No. 9576
Hamlin et al
vs.
Name et al
EXHIBIT
No. 19
Filed 2/13 19 25
R. S. ZIMMERMAN, Clerk
By
Deputy Clerk
SAN GABRIEL
TEMPLE LEASE
LINCOLN AVE
N 38°31'W 1181'
N 88°38'10"W 1767.50'
1" = 200'

thereby made a part thereof as fully as if set forth in full therein, and which Exhibit No. 17, is to be set forth in full therein in the transcript to be prepared and filed in this cause, is true and correct and may be approved by the Judge without notice.

DATED: Oct. 1st 1935

LAWLER & DEGNAN
By Brenton L. Metzler
Attorneys for Plaintiff
L. G. Campbell
Eugene M. Elson
Attorney for Defendants LAWRENCE V. LEWIS and EVELYN L. HORTON

The foregoing statement of evidence, together with Plaintiff's Exhibit No. 17, which is incorporated therein by reference and *and* thereby made a part thereof as fully as if set forth in full therein, and which Exhibit No. 17 is hereby ordered to be incorporated in said Statement of Evidence, is in all respects hereby approved and settled as a true and complete statement of the evidence adduced on the trial of the above entitled action.

DATED this 4th day of October, 1935.

Geo. Cosgrave
Judge

[Endorsed]: Receipt of a copy of the within Statement of Evidence on the 28th day of August, 1935, is hereby acknowledged. Lawler & Degnan, by Brenton L. Metzler attorneys for plaintiff. Lodged Aug. 30, 1935, R. S. Zimmerman, Clerk, By L. Wayne Thomas, Deputy Clerk. Filed Oct. 4, 1935. R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before the above entitled court and was heard on the 12th and 13th days of February, 1935, plaintiff appearing in court and being represented by its attorneys, Lawler & Degnan, James E. Degnan and Brenton L. Metzler, defendant M. K. Nance appearing in court and being represented by his attorneys, Crail, Shutt & Crail and Claude A. Shutt, and defendants Lawrence V. Lewis and Evelyn L. Horton appearing in court and being represented by their attorneys, L. G. Campbell and Eugene M. Elson, and evidence having been introduced by all of the parties hereto, and the cause having been submitted to the Court for decision, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

The ground upon which the jurisdiction of this court depends is diversity of citizenship between the parties hereto. The matter in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

II.

Plaintiff, Standard Oil Company of California, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, is a citizen of the State of Delaware and has an office at Wilmington, Newcastle County, Delaware.

III.

Defendants, M. K. Nance, Lawrence V. Lewis and Evelyn L. Horton, are citizens of the State of California and reside in Los Angeles County, California.

IV.

On and prior to March 1st, 1909, one Elias J. Baldwin was the owner in fee of all that certain real estate situate, lying and being in the County of Los Angeles, State of California, described as follows, to-wit:

Part of Lot Seventy-two (72) of Tract No. 701, as per map recorded in Book 16, page 110 of Maps, records of Los Angeles County, and part of the Rancho La Merced, described as a whole as follows:

Beginning at a point in the Northerly line of said Lot Seventy-two (72) at the intersection of the lines shown on said map as South 32° 07′ East 862.96 ft. and South 70° 52′ East 952.01 ft., said point of beginning being the Northeast corner of land conveyed by Anita M. Baldwin to Clara Baldwin Stocker by deed dated Sept. 27th, 1916, recorded in Book 6342, Page 165, filed for record Nov. 1st, 1916; thence along the Easterly line of land so conveyed to Clara Baldwin Stocker, South 41° 03′ West 452.8 ft., South 9° 29′ West 1143.87 feet; South 74° 42′ West 896.2 ft; North 75° 26′ 20″ West 699.1 ft.; South 69° West 339 ft.; South 12° 29′ West 1113.50 ft.; South 77° 35′ West 836.84 ft.; North 79° 56′ 30″ West 550 feet; South 22° 26′ West 730 feet; South 50° 23′ West 304.4 feet and South 37° 32′ West 1212 feet to the Southwesterly Patent boundary line of said Rancho and the Southeast corner of land so conveyed to Clara Baldwin Stocker; thence along said patent line South 42° 41′ East

1480 feet to the most Westerly corner of land conveyed to Edwin G. Hart by deed recorded in Book 4937, Page 228 of Deeds; thence along the Northerly line of land so conveyed to Hart North 70° 52′ East 3330.64 feet and South 85° 52′ 40″ East 2733 feet to the Northeast corner of said land of Hart; thence along the Easterly line of said land South 26° 29′ East 638.42 feet to the Northerly line of the Extension of Lincoln Avenue; thence along the Northerly and Westerly lines of said avenue, North 62° 51′ 15″ East 728.27 feet; North 85° 58′ 30″ East 380.48 feet; North 64° 32′ 55″ East 356.60 feet; North 74° 59′ 30″ East 856.14 feet; North 78° 02′ 15″ East 329.73 feet; North 66° 56′ East 202.42 feet; North 34° 37′ 45″ East 53.44 feet; North 12° 45′ 15″ East 80.97 feet; North 18° 06′ 45″ East 216.43 feet; North 26° 02′ 15″ East 395.91 feet; North 18° 55′ 45″ East 96.95 feet and North 38° 21′ 30″ East 10.34 feet to the Southerly line of land conveyed to Walter P. Temple by deed recorded in Book 5193, Page 239 of Deeds; thence along the line of land so conveyed to Temple South 84° 38′ 10″ East 620.98 feet; thence North 07° 46′ East 150 feet to the beginning of a curve in the Southwesterly line of San Gabriel Boulevard 60 feet wide, said curve being concave to the Northeast and having a radius of 230 feet; thence Northwesterly along said curve 217.22 feet to the end of same; thence North 28° 07′ 15″ West 787.35 feet; thence North 41° 48′ West 925.86 feet to the most Northerly corner of the land so conveyed to Temple, on the Easterly line of said Lot 72 of Tract No. 701; thence along said Easterly line of said Lot 72, North 41° 48′ West 895.04 feet; thence Westerly along the Northerly line of said Lot 72 to the place of beginning.

V.

Said Elias J. Baldwin died in Los Angeles County, California, on March 1st, 1909, leaving a Last Will and Testament. By said Last Will and Testament H. A. Unruh was appointed executor thereof and was authorized and empowered as such executor to make sales of the real property belonging to Elias J. Baldwin's estate at public or private sale, and upon such terms and conditions and for such prices as to him, the said H. A. Unruh, should seem best. After the death of said Elias J. Baldwin said Last Will and Testament was duly filed in the office of the County Clerk of the County of Los Angeles, State of California, and thereafter upon proceedings for that purpose duly and regularly had and taken in the Superior Court of the County of Los Angeles, said Will was admitted to probate as the Last Will and Testament of said Elias J. Baldwin, deceased, and said H. A. Unruh was thereupon appointed executor thereof and qualified as such.

On or about the 18th day of September, 1912, said H. A. Unruh, as such executor, under and by virtue of the power of sale set forth in said Will, in the County of Los Angeles, State of California, sold to Walter P. Temple, and Walter P. Temple became the purchaser of the whole of the real estate hereinafter described, for the sum of Five Thousand Eight Hundred Thirteen and 30/100 Dollars ($5,813.30), said Walter P. Temple being the highest and best bidder at said sale. Thereafter the said Superior Court of the County of Los Angeles, State of California, upon due and legal return of the proceedings had under said power of sale in said Will contained, and upon due and legal notice given as required by law,

did on September 30th, 1912, make an order confirming said sale and directing conveyance to be executed to said Walter P. Temple. Thereupon and under date of October 1st, 1912, said H. A. Unruh, as such executor of the Last Will and Testament of Elias J. Baldwin, deceased, made, executed and delivered to said Walter P. Temple a deed to said property, which property was and is more particularly described as follows, to-wit:

All those certain lots, pieces or parcels of land situate, lying and being in the County of Los Angeles, State of California, bounded and described as follows, to-wit:

That part of Lot Seventy-two (72), Tract #701, as per map recorded in Book 16, pages 110-111 of Maps, Records of Los Angeles County; beginning at the most Southeasterly corner of Lot 72, Tract #701, and running thence along the Southwesterly line of said Lot North 73° 31′ W. 1131.40 feet; thence N. 62° 32′ East 510.70 feet; thence North 48° 12′ East 100 feet, a little more or less to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East 836 feet a little more or less to beginning. Also that part of the Rancho La Merced, as per Patent recorded in Book 13, page 16 of Patents, Records of Los Angeles County. Beginning at the most Southeasterly corner of Lot 72, tract 701, as per map recorded in Book 16, pages 110-111 of Maps, Records of Los Angeles County and running thence South 41° 48′ East 89.86 feet; thence South 28° 07′ 15″ East 787.35 feet to the beginning of a curve concave to the Northeast and having a radius of 230 feet; thence along said curve 217.22 feet to the end of same; thence South 07° 46′ West 150 feet; thence North 84° 38′ 10″ West 1767.9 feet; thence South 76° 17′ West

740 feet; thence North 10° 43′ East 1225 feet; thence North 74° 55′ 50″ East 604.52 feet, a little more or less to the Southwesterly line of Tract #701, thence South 73° 31′ East 1131.4 feet to the point of beginning.

Subject to a right of way for poles or towers *up*-which to suspend cross-arms or brackeys wires for the transmission of electrical energy, as granted by Clara Baldwin Stocker and Anita Baldwin McClaughry to the Southern Californis Edison Company by Deed recorded in Book 4755, page 144 of Deeds, Records of Los Angeles County; excepting and reserving, however, for road purposes, a strip of land of a uniform width of forth (40) feet, immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land.

Said deed was duly acknowledged so as to entitle same to be recorded, and said deed was thereafter and on October 30th, 1912, recorded in Book 5193 of Deeds, page 239, Records of Los Angeles County, in the office of the County Recorder of said County.

A full, true and correct copy of said deed is attached to plaintiff's bill of complaint, made a part thereof and marked Exhibit "A".

VI.

Thereafter, and on or about August 11, 1915, by a written lease and agreement bearing that date, the said Walter P. Temple and his wife, Laura G. Temple, as party of the first part, for a valuable consideration, leased, let and demised unto J. M. Kent, as party of the second

part, the sole and exclusive right to mine, dig, excavate, bore and drill for and otherwise develop and obtain the oil, gas, asphaltum and water, together with the right to sever, remove and take such substance from the lands situated in the County of Los Angeles, State of California, bounded and described as follows:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California; as per map recorded in Book 16, pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot 72; thence along the Southwesterly line of said Lot North 73° 31′ West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North 62° 32′ East five hundred ten and seventy hundredths (510.70) feet; thence North 48° 12′ East, one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East, eight hundred thirty-six (836) feet, more or less, to beginning.

ALSO that part of the Rancho La Merced, in the County of Los Angeles, State of California; as per Patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most South Easterly corner of Lot Seventy-two (72), Tract No. 701, as per map recorded in Book 16, Pages 110 and 111 of Maps; thence south 41° 48′ East, eighty-nine and eighty-six hundredths (89.86) feet; thence South 28° 07′ 15″ East seven hundred eighty-seven and thirty-five hundredths (787.35) feet to the beginning of a curve concave to the North East

and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet to the end of same; thence south 07° 46′ West one hundred fifty (150) feet; thence North 84° 38′ 10″ West seventeen hundred sixty-seven and nine tenths (1767.9) feet; thence South 76° 17′ West, seven hundred and forty (740) feet; thence North 10° 43′ East, twelve hundred twenty-five (1225) feet; thence North 74° 55′ 50″ East, six hundred four and fifty-two hundredths (604.52) feet; more or less, to the South Westerly line of Tract Number Seven Hundred One (701); thence South 73° 31′ East eleven hundred thirty-one and four tenths (1131.4) feet; to point of beginning.

EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land, reserved for road purposes.

EXCEPTING THEREFROM the most South Easterly Two (2) acres of said Tract, being bounded on the North by the San Gabriel Boulevard, on the South by that portion of the Southerly boundary line of said Tract extending Westerly from the South Easterly corner of the Tract to the proposed road hereinafter referred to, on the East by the boundary line of said Tract extending from the South Easterly corner thereof to the San Gabriel Boulevard and on the West by a proposed road to extend in a North Easterly direction from the Southerly boundary line of said tract to the said San Gabriel Boulevard, and to be located by the lessor herein on a line not more than

One Hundred Seventy (170) feet West of a certain pumping plant now located on said two acres.

SUBJECT TO: 1. Right to construct and maintain a line of poles or towers over a strip of land 50 feet wide across the Rancho La Merced, as granted by Clara Baldwin Stocker and Anita Baldwin McClaughry, to Southern California Edison Company, a corporation, by deed recorded in Book 4755, Page 144 of Deeds.

2. A mortgage, executed by Walter P. Temple and Laura G. Temple, his wife, to secure a note for Thirty-eight Hundred Seventy-five Dollars (3875.00), dated October 2nd, 1912, due three (3) years after date, with interest at seven per cent (7%) per annum, payable semi-annually, in favor of H. A. Unruh, Executor, filed for record October 30th, 1912;

together with the right to enter into and upon said premises and to construct, use, maintain, erect, repair, replace and remove such buildings, structures and machinery as might be necessary in carrying on the business of mining and developing said property and the constructing, removing, repairing, replacing, maintaining, and using under, along and throughout same, such pipe lines, telephone and telegraph lines and right of way for passage as might be needed in carrying on said business and mining operations for said premises, to have and to hold the said premises with the appurtenances unto said J. M. Kent for the full period of twenty-five years and so long thereafter as oil or gas or either of them should be produced in paying quantities thereon, unless otherwise forfeited by said J. M. Kent; and said J. M. Kent leased from said Walter P. Temple and Laura G. Temple the above described

premises for the purpose and term aforesaid and upon the conditions and considerations set forth in said lease.

Said lease was duly executed and acknowledged by the parties thereto and was thereafter recorded on November 9, 1915, in Book 106, page 39, of Leases, Los Angeles County Records. Said lease is commonly known, and will be hereinafter referred to, as the "Temple lease". A full, true and correct copy of said Temple lease is attached to plaintiff's Bill of Complaint herein, made a part thereof and marked Exhibit "B".

The strip of land of a uniform width of forty (40) feet, immediately along and adjoining on the easterly and southeasterly side of the entire length of the westerly and northwesterly boundary line of the land described in said Temple lease will be hereinafter referred to as the "forty-foot strip".

VII.

By the following language in said Temple lease, viz.:

"EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land, reserved for road purposes."

the parties to said Temple lease intended to and did reserve to the party of the first part therein an easement for road purposes over said forty-foot strip and did not intend to, and did not, except any of the oil, gas or other hydrocarbon substances in or under said forty-foot strip. By said Temple lease, the party of the first part named therein intended to and did lease, let and demise unto the party

of the second part named therein, and the said party of the second party intended to and did hire, lease and take from said party of the first part, the sole and exclusive right to mine, dig, excavate, bore and drill for, and otherwise develop and obtain the oil, gas, asphaltum and water, together with the right to sever, remove and take such substance from all of the lands within the exterior boundaries described in said Temple lease, subject to an easement for road purposes over said forty-foot strip and subject to such surface easements or restrictions affecting portions of the remainder of said lands as are set forth in said Temple lease.

VIII.

Under date of April 4, 1916, by a written agreement executed by Walter P. Temple and his wife, Laura G. Temple, as parties of the first part, and J. M. Kent, as party of the second part, the original term of said Temple lease was extended for one year. Said extension agreement was duly executed and acknowledged by the parties thereto and was thereafter recorded February 13, 1917, in Book 107, page 131, of Leases, Records of Los Angeles County.

IX.

Thereafter, by a written assignment duly executed by J. M. Kent under date of November 6, 1916, and recorded November 28, 1916, in Book 104, page 333, of Leases, Records of Los Angeles County, California, said J. M. Kent sold, assigned, conveyed, transferred and delivered said Temple lease to Standard Oil Company, a California corporation, together with all the rights and privileges, incidents and appurtenances of the estate and interest in

and to the said real property created by said lease and agreement or then used and enjoyed by said J. M. Kent in connection therewith, and in and to the oil, gas, asphaltum and water in and under such real property; and said J. M. Kent likewise, by said written assignment, sold, assigned, conveyed, transferred and delivered to said Standard Oil Company all his right, title and interest in, under or by virtue of that certain extension agreement described in Paragraph VIII hereof.

X.

Thereafter, by a written supplemental agreement dated November 1, 1917, between Walter P. Temple and Laura G. Temple, his wife, as first parties, and Standard Oil Company, a California corporation, as second party, said parties to said supplemental agreement entered into an agreement with respect to the two (2) acres referred to under the heading, "EXCEPTING THEREFROM", in the description contained in said Temple lease. Said supplemental agreement was recorded November 7, 1917, in Book 117, page 32, of Leases, Records of Los Angeles County, California.

In said supplemental agreement there appeared, and appear, in parenthesis on page 1 thereof, the following words: "excepting only the strip of land excepted for road purposes". By the use of said words, the parties to said supplemental agreement intended to restate the original intent, that an easement for road purposes had been reserved over said forty-foot strip.

XI.

Subsequently, by a written instrument duly executed under date of March 29, 1926, and recorded April 15,

1926, in Book 4543, page 382, Official Records of Los Angeles County, California, said Standard Oil Company, a California corporation, conveyed, transferred, assigned and set over to plaintiff said Temple lease and said extension agreement and said supplemental agreement, and all its right, title and interest in, under or by virtue thereof, together with its right, title and interest in and to the real property in said lease and hereinabove described and in and to the oil, gas, asphaltum and water therein and thereunder.

XII.

Plaintiff is now, and has been at all times since March 29, 1926, the owner and in possession of said Temple lease and said leasehold estate and of all the rights and privileges, incidents and appurtenances of the estate and interest in and to the said real property created by said Temple lease and of the oil, gas, asphaltum and water therein and thereunder; and plaintiff is in possession of all of the premises in said lease described, and has been in such possession at all times since March 29, 1926. Plaintiff's assignor, Standard Oil Company, a California corporation, was the owner and in possession of said Temple lease and the leasehold estate thereby created, and was in possession of all of the premises in said lease described continuously from November 6, 1916, until plaintiff took possession thereof on March 29, 1926.

XIII.

Plaintiff is now and for many years last past has been producing from the real property described in the Temple lease oil and gas in commercial paying quantities. Said leasehold estate and the right to produce oil, gas, as-

phaltum and water from the real property above described are of a value in excess of the sum of One Hundred Thousand Dollars ($100,000). Plaintiff and its predecessors in interest have complied with and fully performed all the obligations by it or them to be performed under the Temple lease and the extension and supplemental agreements thereto.

XIV.

In addition to the Temple lease, plaintiff is the owner of an adjoining lease created by a certain written agreement dated October 9, 1916, between Anita M. Baldwin, as lessor, and Standard Oil Company, a California corporation, as lessee, whereby said Anita M. Baldwin, for a valuable consideration, did lease, let and demise to said Standard Oil Company certain land, hereinafter described, with the sole and exclusive right to the lessee to drill for, produce, extract and take oil, gas, asphaltum and other hydrocarbon substances and water from and store the same upon said land during the term of said lease, with the right to enter on said land at all times for said purposes and from time to time to construct, use, maintain, erect, repair, replace and remove thereon and therefrom all buildings, tanks, machinery, telephone and telegraph wires and other structures, including all pipe lines, which the lessee might desire in carrying on its business and mining operations on said premises, rights of way for passage over and upon and across, and ingress to and egress from said premises. The lands which were and are the subject of said lease are situated in the County of Los Angeles, State of California, and are more particularly described as follows:

Part of Lot Seventy-two (72) of Tract No. 701, as per map recorded in Book 16, page 110 of Maps, records of Los Angeles County, and part of the Rancho La Merced, described as a whole as follows:—

Beginning at a point in the Northerly line of said Lot Seventy-two (72) at the intersection of the lines shown on said map as South 32° 07′ East 862.96 ft. and South 70° 52′ East 952.01 ft., said point of beginning being the Northeast corner of land conveyed by Anita M. Baldwin to Clara Baldwin Stocker by deed dated Sept. 27th, 1916, recorded in Book 6342, Page 165, filed for record Nov. 1st, 1916; thence along the Easterly line of land so conveyed to Clara Baldwin Stocker, South 41° 03′ West 452.8 ft., South 9° 29′ West 1143.87 feet; South 74° 42′ West 896.2 ft.; North 75° 26′ 20″ West 699.1 ft.; South 69° West 339 ft; South 12° 29′ West 1113.50 ft; South 77° 35′ West 836.84 feet; North 79° 56′ 30″ West 550 feet; South 22° 26′ West 730 feet; South 50° 23′ West 304.4 feet and South 37° 32′ West 1212 feet to the Southwesterly Patent boundary line of said Rancho and the Southeast corner of land so conveyed to Clara Baldwin Stocker; thence along said patent line South 42° 41′ East 1480 feet to the most Westerly corner of land conveyed to Edwin G. Hart by deed recorded in Book 4937, Page 228 of Deeds; thence along the Northerly line of land so conveyed to Hart North 70° 52′ East 3330.64 feet and South 85° 52′ 40″ East 2733 feet to the Northeast corner of said land of Hart; thence along the Easterly line of said land South 26° 29′ East 638.42 feet to the Northerly line of the Extension of Lincoln Avenue; thence along the Northerly and Westerly lines of said avenue, North 62° 51′ 15″ East 728.27 feet; North 85° 58′ 30″ East

380.48 feet; North 64° 32′ 55″ East 356.60 feet; North 74° 59′ 30″ East 856.14 feet; North 78° 02′ 15″ East 329.73 feet; North 66° 56′ East 202.42 feet; North 34° 37′ 45″ East 53.44 feet; North 12° 45′ 15″ East 80.97 feet; North 18° 06′ 45″ East 216.43 feet; North 26° 02′ 15″ East 395.91 feet; North 18° 55′ 45″ East 96.95 feet and North 38° 21′ 30″ East 10.34 feet to the Southerly line of land conveyed to Walter P. Temple by deed recorded in Book 5193, Page 239 of Deeds; thence along the line of land so conveyed to Temple North 84° 38′ 10″ West 1146.92 feet to an angle in said line; thence still along said line South 76° 17′ West 740 feet; North 10° 43′ East 1225 feet; North 74° 55′ 50″ East 604.52 feet; North 62° 32′ East 510.70 feet and North 49° 12′ East 100 feet to the most Northerly corner of land so conveyed to Temple, on the Easterly line of said Lot seventy-two (72), of Tract No. 701; thence along said Easterly line of Lot Seventy-two (72), North 41° 48′ West 895.04 feet; thence Westerly along the Northerly line of said Lot Seventy-two (72) to the place of beginning.

Containing in said Lot Seventy-two (72) 124.866 acres, more or less and in the Rancho La Merced 587.407 acres more or less.

In said written agreement of lease it is provided that the lessee shall hold said premises, with the appurtenances, for a period of twenty years from the date thereof and so long thereafter as oil, gas, asphaltum or other hydrocarbons were produced in paying quantities thereon.

Said lease was duly executed and acknowledged by the parties thereto and was thereafter recorded November 15, 1916, in Book 106, page 165, of Leases, Los Angeles

County Records. Said lease is commonly known as, and will be hereinafter referred to as, the "Baldwin lease".

XV.

By a written indenture dated March 29, 1926, executed by Standard Oil Company, a California corporation, as party of the first part, and plaintiff, as party of the second part, said Standard Oil Company transferred, assigned, and set over to plaintiff, among other things, said Baldwin lease. Said written indenture whereby said Baldwin lease was so assigned to plaintiff was duly acknowledged and was thereafter and on April 15, 1926, recorded in Book 4543, page 382, of Official Records of Los Angeles County, California.

Plaintiff has been the owner of said Baldwin lease and in possession of the premises described therein, at all times since March 29, 1926. Plaintiff's assignor, Standard Oil Company, a California corporation, was the owner of said Baldwin lease, and in possession of the premises described therein at all times from October 9, 1916, until the time plaintiff took possession thereof on March 29, 1926.

Plaintiff and its predecessors in interest have complied with and fully performed all the obligations by it or them to be performed under the said Baldwin lease.

XVI.

Both the Baldwin and Temple leases are situated in the Montebello oil field in Los Angeles County, California. The Temple lease embraces approximately fifty-eight and five hundredths (58.05) acres and the Badwin lease embraces approximately seven hundred twelve and two hundred seventy-three thousandths (712.273) acres. Except

for the northeasterly boundary of the Temple lease, which borders upon San Gabriel Boulevard, and a portion of the south and southeasterly boundary of said Temple lease lying east of Lincoln Avenue, the lands embraced in said Temple lease are surrounded by the lands embraced in the Baldwin lease.

XVII.

The said forty-foot strip of land lies within and contiguous to the northwesterly and westerly boundaries of the Temple lease, and immediately adjacent to the Baldwin lease. Said strip commences at San Gabriel Boulevard at the northern-most point of the Temple lease and extends southwesterly and southerly within and along the said boundaries continuously for a distance of approximately twenty-four hundred forty and twenty-two hundredths (2440.22) feet to the most southwesterly point of said Temple lease, where said strip terminates. Said strip contains an area of approximately two and twenty-two hundredths (2.22) acres.

XVIII.

On the Temple lease seventeen (17) oil wells have been drilled by plaintiff or its predecessor in interest, all of which are capable of producing oil, gas and other hydrocarbon substances in commercially paying quantities, but which are under voluntary curtailment in accordance with the general economic policy of the oil industry now in force in the State of California. Of said wells, fourteen (14) thereof are now producing oil. Of the wells upon the Temple lease, Temple No. 1 is within 242 feet of said forty-foot strip, Temple No. 9 is within 230 feet of said strip, and Temple No. 10 is within 115 feet of said strip.

XIX.

On the Baldwin lease seventy-five (75) oil wells have been drilled by plaintiff or its predecessor in interest, sixty-six (66) of which are capable of producing oil, gas and other hydrocarbon substances in commercially paying quantities, but which are under voluntary curtailment in accordance with the general economic policy of the oil industry now in force in the State of California. Of said wells capable of producing oil, forty-nine (49) thereof are now producing oil. Of the wells upon the Baldwin lease, Baldwin No. 5 is within 363 feet of said forty-foot strip, Baldwin No. 28 is within 318 feet of said strip, Baldwin No. 37 is within 155 feet of said strip, Baldwin No. 40 is within 402 feet of said strip, Baldwin No. 45 is within 375 feet of said strip, and Baldwin No. 47 is within 302 feet of said strip.

XX.

From November 6, 1916, when Standard Oil Company, plaintiff's assignor, went into possession of the premises described in said Temple lease, down to the present time, said Standard Oil Company and plaintiff have continuously and openly laid and erected pipe, power, telegraph and telephone lines and constructed boiler plants, storage tanks and roads upon the land described in said Temple lease—all in aid of oil and gas development. During said period, some of these facilities have crossed, and now cross, the outer boundaries of the Temple and Baldwin lands, and have been, and now are, maintained along, over and under the forty-foot strip. Defendants and each of them and their predecessors in interest and each of them have had notice of the matters and things in this finding recited, and have assented thereto.

XXI.

In January, 1921, Walter P. Temple demanded from Standard Oil Company payment of seven-eighths of the increased land taxes for the year 1920 upon all the land included within the exterior boundaries of the Temple property, which boundaries included said forty-foot strip, said Temple describing the amount demanded of Standard Oil Company as "being your share of Los Angeles County Taxes in accordance with our lease". Standard Oil Company paid the amount so demanded by Temple in January, 1921.

In June, 1921, Standard Oil Company billed Walter P. Temple and Laura G. Temple for one-eighth of the taxes on mining rights assessed for the year 1921-1922 upon the entire acreage included within the exterior boundaries of the Temple property, and said Walter P. Temple thereafter paid said one-eighth of said taxes to Standard Oil Company.

XXII.

On or about June 16, 1933, Walter P. Temple made and executed a quitclaim deed to defendants Lawrence V. Lewis and Evelyn L. Horton, a true and correct copy of which quitclaim deed is attached to the answer of defendant M. K. Nance, and made a part thereof and marked "Exhibit A". Said quitclaim deed was recorded June 17, 1933, in Book 12232, at page 155, of Official Records, Los Angeles County, California.

XXIII.

On or about May 29, 1933, defendants Lawrence V. Lewis and Evelyn L. Horton executed and delivered to defendant M. K. Nance a certain written indenture of

lease entitled "Gas and Oil Lease", a true and correct copy of which is attached to plaintiff's Bill of Complaint, made a part thereof and marked Exhibit "D". Said indenture of lease, which is hereinafter referred to as the "Nance lease", was recorded June 13, 1933, in Book 12185, page 183, of Official Records, Los Angeles County, California.

XXIV.

On or about August 26, 1933, defendant M. K. Nance, acting by and through his agents and servants, entered upon said forty-foot strip of land heretofore described, and by means of motor trucks deposited thereon certain sand, gravel, cement and water, together with tools and other apparatus for the making of excavations and constructing concrete corner posts for an oil derrick. Defendant Nance thereupon caused locations to be staked out for three oil wells upon said forty-foot strip, and proceeded to and did pour concrete posts upon which to erect a derrick, and proceeded with the excavation of a cellar or pit over which to construct said oil derrick.

On July 1, 1933, and prior to the entry of defendant Nance upon said forty-foot strip, as aforesaid, plaintiff notified said defendants Nance, Lewis, and Horton that plaintiff was the owner of said Temple lease, that defendants had no right, title or interest of any nature whatsoever in or to any oil, gas or other hydrocarbon substances in or under said forty-foot strip; that plaintiff was lawfully in possession of said forty-foot strip and intended to remain in possession thereof; that no one had the right to enter thereon without plaintiff's permission for other than agricultural or grazing purposes; and plaintiff thereupon warned defendants to refrain from entering

upon said forty-foot strip and from doing any act having for its purpose the removal of any oil, gas or other hydrocarbon substances in or under said strip.

Plaintiff first learned of the entry of defendant Nance upon said forty-foot strip on August 26, 1933. On August 28, 1933, plaintiff, through its attorneys, notified defendant Nance that his entry upon said forty-foot strip and the activities of his agents and servants thereon constituted a trespass; and plaintiff thereupon warned said defendant Nance to desist from further entry or activity upon said premises. Said defendant Nance thereupon defied plaintiff and plaintiff's attorneys, and stated that he intended to and would proceed to drill an oil well upon said forty-foot strip.

XXV.

The oil producing horizons underlying the surface of said Temple and Baldwin leases are predominately sands of a coarse nature, which offer a minimum resistance to the movement of fluids. Oil wells upon these leases have a drainage area in excess of a four hundred (400) foot radius for each well. The wells now drilled upon said premises are sufficient to economically take the oil from the whole of said premises. Any new wells which might be drilled would take oil that may be produced from existing wells.

If wells are drilled upon said forty-foot strip, such wells will drain oil from both the Temple and Baldwin leases within a distance of exceeding 380 feet from said forty-foot strip.

XXVI.

Purporting to act under the terms and provisions of said Nance lease, copy of which is attached to plaintiff's Bill of Complaint as Exhibit "D", defendant Nance threatens to, and will unless enjoined, drill upon said forty-foot strip embraced within said Temple lease at least three oil wells and in addition thereto such further number of oil wells as said Nance may elect.

Defendants Lewis and Horton threaten to, and will unless enjoined, lease said forty-foot strip for oil and gas purposes and the drilling of wells thereon.

XXVII.

By the oil wells which defendants threaten to drill or to cause to be drilled, large and valuable amounts of oil, gas and other hydrocarbon substances will be drained from under the property described in the Temple lease and from under the property described in the Baldwin lease; and by such drainage the value of plaintiff's leaseholds will be materially depreciated and the income and revenue derived by plaintiff therefrom will be materially decreased and plaintiff will suffer great and irreparable damage and injury for the redress of which plaintiff has no adequate remedy at law.

XXVIII.

Defendants Lewis and Horton claim an interest in and to said forty-foot strip as follows, to-wit: the fee simple title, free and clear of any leasehold or other interest,

licenses, easements or other rights or privileges therein or thereto belonging to any other person, firm or corporation, and, in addition thereto, said defendants Lewis and Horton claim the exclusive right to prospect on said forty-foot strip for oil and gas. Defendant Nance claims to be the lessee of said forty-foot strip from said defendants Lewis and Horton under and pursuant to that certain instrument entitled "Gas and Oil Lease", copy of which is attached to plaintiff's Bill of Complaint, made a part thereof and marked Exhibit "D", and said defendant Nance claims the right to produce and extract oil and gas from said forty-foot strip. Said claims of said defendants and each of them are, and each of said claims is, adverse to plaintiff. Said claims of said defendants and each of them are, and each of said claims is, without any right whatsoever.

Said Temple lease, the leasehold estate created thereby, and all of the rights and privileges owned by plaintiff, as hereinabove set forth, are all, and each of them is, prior and superior to any and all claims, estates, rights, titles and interests of defendants and each of defendants, other than an easement for road purposes over said forty-foot strip.

Defendants have not, and none of defendants has, any right to mine, dig, excavate, bore or drill for, or otherwise develop or obtain the oil, gas, asphaltum or water, or to sever, remove or take such substance from said forty-foot strip or from any part thereof or from any part of the real property in said Temple lease described, during the term of said Temple lease.

And from the foregoing Findings of Fact, the Court makes the following Conclusions:

CONCLUSIONS OF LAW

Plaintiff is entitled to a judgment and decree declaring and adjudging:

1. That plaintiff is the true and lawful owner and is entitled to the possession and enjoyment of that certain lease made and entered into the 11th day of August, 1915, by and between Walter P. Temple and his wife, Laura G. Temple, as party of the first part, and J. M. Kent, as party of the second part, which lease is recorded in Book 106, page 39, of Leases, Records of Los Angeles County, California, and all extensions, supplements, modifications and amendments thereof and thereto (which lease, together with the extensions, supplements, modifications and amendments thereof and thereto are hereinafter called the "Temple lease"); and that plaintiff is the owner and is entitled to the possession and enjoyment of the leasehold estate and all of the rights and privileges created by said Temple lease.

2. That plaintiff is the true and lawful owner and is entitled to the possession and enjoyment of the sole and exclusive right to mine, dig, excavate, bore and drill for, and otherwise develop and obtain the oil, gas, asphaltum and water, together with the right to sever, remove and take such substance from the following described real

property in the County of Los Angeles, State of California, viz.:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California; as per map recorded in Book 16, Pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot 72; thence along the Southwesterly line of said Lot North 73° 31′ West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North 62° 32′ East five hundred ten and seventy hundredths (510.70) feet; thence North 48° 12′ East, one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boulevard; thence along said Southwesterly line South 41° 48′ East, eight hundred thirty-six (836) feet, more or less, to beginning.

ALSO that part of the Rancho La Merced, in the County of Los Angeles, State of California; as per Patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most South Easterly corner of Lot Seventy-two (72), Tract No. 701, as per map recorded in Book 16, Pages 110 and 111 of Maps; thence south 41° 48′ East, eighty-nine and eighty-six hundredths (89.86) feet; thence South 28° 07′ 15″ East seven hundred eighty-seven and thirty-five hundredths (787.35)

feet to the beginning of a curve concave to the North East and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet to the end of same; thence south 07° 46′ West one hundred fifty (150) feet; thence North 84° 38′ 10″ West seventeen hundred sixty-seven and nine tenths (1767.9) feet; thence South 76° 17′ West, seven hundred and forty (740) feet; thence North 10° 43′ East, twelve hundred twenty-five (1225) feet; thence North 74° 55′ 50″ East, six hundred four and fifty-two hundredths (604.52) feet; more or less, to the South Westerly line of Tract Number Seven Hundred One (701); thence South 73° 31′ East eleven hundred thirty-one and four tenths (1131.4) feet; to point of beginning.

for the term and upon the conditions set forth in said Temple lease, subject to an easement for road purposes over a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the easterly and southeasterly side of the entire length of the westerly and northwesterly boundary line of the above described two parcels of land (which strip of land is hereinafter referred to as the "forty-foot strip"), and subject to such surface easements or restrictions affecting portions of the remainder of said lands as are set forth in said Temple lease.

3. That said Temple lease, the leasehold estate created thereby, and all of the rights and privileges owned by

plaintiff, as hereinabove in these Conclusions set forth, are all, and each of them is, prior and superior to any and all claims, estates, rights, titles and interests of defendants and each of defendants, other than an easement for road purposes over said forty-foot strip.

4. That defendants have not, and none of defendants has, any right to mine, dig, excavate, bore or drill for, or otherwise develop or obtain the oil, gas, asphaltum or water, or to sever, remove or take such substance from said forty-foot strip or from any part thereof or from any part of the real property hereinabove in these Conclusions particularly described, during the term of said Temple lease.

5. That all adverse claims of the defendants and each of them, and of all persons claiming or to claim under them or any of them be adjudged and decreed to be invalid and groundless; and that plaintiff's title to and ownership of said Temple lease, the leasehold estate, and the rights and privileges created thereby, and all of the rights and privileges hereinabove in these Conclusions concluded to be owned by plaintiff be adjudged and decreed to be quieted against all claims, demands or pretensions of the defendants and each of them.

6. That the defendants and each of them, their agents, servants and employees be permanently enjoined and restrained from exploring, prospecting, mining, digging, excavating, boring or drilling for, or developing, obtaining, severing, removing or taking oil, gas, asphaltum or water

upon, in, under or from said forty-foot strip or any part thereof, during the term of said Temple lease.

7. That plaintiff recover from defendants and each of them its costs of suit herein.

I HEREBY DIRECT THAT JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 9th day of March, 1935.

Geo. Cosgrave
Judge of the United States District Court

Approved as to form, as provided in Rule 44.

March 9th, 1935.

CRAIL, SHUTT & CRAIL,
By Claude A. Shutt
Attorneys for defendant M. K. Nance

L. G. Campbell
Eugene M. Elson
Attorneys for defendants Lawrence V. Lewis and Evelyn L. Horton

[Endorsed]: Filed Mar. 11. 1935 R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Plaintiff,	)	No. Eq. 57-C
vs.	)	JUDGMENT
M. K. NANCE, LAWRENCE V. LEWIS and EVELYN L. HORTON, Defendants.	)	and DECREE

This cause came on for trial before the above entitled Court and was heard on the 12th and 13th days of February, 1935, plaintiff appearing in court and being represented by its attorneys, Lawler & Degnan, James E. Degnan and Brenton L. Metzler, defendant M. K. Nance appearing in court and being represented by his attorneys, Crail, Shutt & Crail and Claude A. Shutt, and defendants Lawrence V. Lewis and Evelyn L. Horton appearing in court and being represented by their attorneys, L. G. Campbell and Eugene M. Elson. and evidence having been introduced by all of the parties hereto, and the cause having been submitted to the Court for decision, and the Court having made and filed its Findings of Fact and Conclusions of Law herein,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That plaintiff is the true and lawful owner and is entitled to the possession and enjoyment of that certain lease made and entered into the 11th day of August, 1915,

by and between Walter P. Temple and his wife, Laura G. Temple, as party of the first part, and J. M. Kent, as party of the second part, which lease is recorded in Book 106, page 39, of Leases, Records of Los Angeles County, California, and all extensions, supplements, modifications and amendments thereof and thereto (which lease, together with the extensions, supplements, modifications and amendments thereof and thereto, are hereinafter called the "Temple lease"); and that plaintiff is the owner and is entitled to the possession and enjoyment of the leasehold estate and all of the rights and privileges created by said Temple lease.

2. That plaintiff is the true and lawful owner and is entitled to the possession and enjoyment of the sole and exclusive right to mine, dig, excavate, bore and drill for, and otherwise develop and obtain the oil, gas, asphaltum and water, together with the right to sever, remove and take such substance from the following described real property in the County of Los Angeles, State of California, viz.:

That part of Lot Seventy-two (72) of Tract Number Seven Hundred One (701), in the County of Los Angeles, State of California; as per map recorded in Book 16, Pages 110 and 111 of Maps, in the office of the County Recorder of said County, described as follows:

Beginning at the most Southeasterly corner of said Lot 72; thence along the Southwesterly line of said Lot North 73° 31′ West eleven hundred thirty-one and forty hundredths (1131.40) feet; thence North 62° 32′ East five hundred ten and seventy hundredths (510.70) feet; thence North 48° 12′ East, one hundred (100) feet, more or less, to the Southwesterly line of San Gabriel Boule-

vard; thence along said Southwesterly line South 41° 48′ East, eight hundred thirty-six (836) feet, more or less, to beginning.

ALSO that part of the Rancho La Merced, in the County of Los Angeles, State of California; as per Patent recorded in Book 13, Page 16 of Patents, in the office of the County Recorder of said County, described as follows:

Beginning at the most South Easterly corner of Lot Seventy-two (72), Tract No. 701, as per map recorded in Book 16, Pages 110 and 111 of Maps; thence south 41° 48′ East, eighty-nine and eighty-six hundredths (89.86) feet; thence South 28° 07′ 15″ East seven hundred eighty-seven and thirty-five hundredths (787.35) feet to the beginning of a curve concave to the North East and having a radius of two hundred thirty (230) feet; thence along said curve two hundred seventeen and twenty-two hundredths (217.22) feet to the end of same; thence south 07° 46′ West one hundred fifty (150) feet; thence North 84° 38′ 10″ West seventeen hundred sixty-seven and nine tenths (1767.9) feet; thence South 76° 17′ West seven hundred and forty (740) feet; thence North 10° 43′ East, twelve hundred twenty-five (1225) feet; thence North 74° 55′ 50″ East, six hundred four and fifty-two hundredths (604.52) feet; more or less, to the South Westerly line of Tract Number Seven Hundred One (701); thence South 73° 31′ East eleven hundred thirty-one and four tenths (1131.4) feet; to point of beginning.

for the term and upon the conditions set forth in said Temple lease, subject to an easement for road purposes over a strip of land of a uniform width of forty (40)

feet immediately along and adjoining on the easterly and southeasterly side of the entire length of the westerly and northwesterly boundary line of the above described two parcels of land (which strip of land is hereinafter referred to as the "forty-foot strip"), and subject to such surface easements or restrictions affecting portions of the remainder of said lands as are set forth in said Temple lease.

3. That said Temple lease, the leasehold estate created thereby, and all of the rights and privileges owned by plaintiff, as hereinabove in this Judgment and Decree set forth, are all, and each of them is, prior and superior to any and all claims, estates, rights, titles and interests of defendants and each of defendants, other than an easement for road purposes over said forty-foot strip.

4. That defendants have not, and none of defendants has, any right to mine, dig, excavate, bore or drill for, or otherwise develop or obtain the oil, gas, asphaltum or water, or to sever, remove or take such substance from said forty-foot strip or from any part thereof or from any part of the real property hereinabove in this Judgment and Decree particularly described, during the term of said Temple lease.

5. That all adverse claims of the defendants and each of them, and of all persons claiming or to claim under them or any of them be, and they are hereby, adjudged and decreed to be invalid and groundless; and that plaintiff's title to and ownership of said Temple lease, the leasehold estate, and the rights and privileges created thereby, and all of the rights and privileges hereinabove in this Judgment and Decree declared to be owned by plaintiff be, and they are hereby, adjudged and decreed to

be quieted against all claims, demands or pretensions of the defendants and each of them.

6. That the defendants and each of them, their agents, servants and employees be, and they are hereby, permanently enjoined and restrained from exploring, prospecting, mining, digging, excavating, boring or drilling for, or developing, obtaining, severing, removing or taking oil, gas, asphaltum or water upon, in, under or from said forty-foot strip or any part thereof, during the term of said Temple lease.

7. That plaintiff recover from defendants and each of them its costs of suit herein. Costs taxed at $576.62.

DATED this 9th day of March, 1935.

Geo. Cosgrave
Judge of the United States District Court.

Approved as to form, as provided in Rule 44.
March 9th, 1935.

CRAIL, SHUTT & CRAIL,
By Claude A. Shutt
Attorneys for defendant M. K. Nance

L. G. Campbell
Eugene M. Elson
Attorneys for defendants Lawrence V. Lewis and Evelyn L. Horton

Decree entered and recorded Mar. 11, 1935
R. S. ZIMMERMAN, Clerk
By Francis E. Cross, Deputy Clerk.

[Endorsed]: Filed Mar. 11, 1935. R. S. Zimmerman Clerk By Francis E. Cross, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL AND ALLOWANCE.

TO THE HONORABLE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Come now LAWRENCE V. LEWIS and EVELYN L. HORTON, petitioners and defendants in the above entitled matter, and considering themselves aggrieved by the order and/or judgment of the United States District Court, Southern District of California, Central Division, made and entered on the 11th day of March, 1935, in the above entitled cause, in favor of the plaintiff therein, hereby appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed, that a proper order as to the security to be required of petitioners be made, that a citation be issued, directed to the above named plaintiff as provided by law, and that a transcript of the record, proceedings, pleadings and documents upon which said order and/or judgment was based be duly authenticated and sent to the United States Circuit Court of *Appeal*, for the Ninth Circuit, in accordance with the rules of said court in such case made and provided.

Your Petitioners further represent that M. K. Nance, a defendant in this cause, has been served with written

notice to appear and join in this appeal and has refused to join therein.

Dated, at Los Angeles, California, in the Southern District of California, this 25th day of May, 1935.

LAWRENCE V. LEWIS and
EVELYN L. HORTON,
By L. G. Campbell
By Eugene M. Elson
Attorneys for Appellants.

IT IS ORDERED, on motion of the defendants Lawrence V. Lewis and Evelyn L. Horton, that the foregoing petition is hereby granted and the appeal of said defendants be and is hereby allowed, as prayed for, without the joining therein of the defendant M. K. Nance, cost bond to be given by said defendants in the sum of Two Hundred and Fifty Dollars ($250.00).

Dated, this 3rd day of June 1935.

Geo Cosgrave
Judge.

[Endorsed]: Filed Jun 3 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Plaintiff, vs. M. K. NANCE, LAWRENCE V. LEWIS and EVELYN L. HORTON, Defendants.	No. Eq. 57-C
— — — — — — — — — —	ASSIGNMENT OF ERRORS.
LAWRENCE V. LEWIS and EVELYN L. HORTON, Appellants, vs. STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Appellee.	

Come now LAWRENCE V. LEWIS and EVELYN L. HORTON, defendants and appellants in the above entitled matter, and respectfully present as assignments of error on the appeal herein from the order and/or judgment of the United States District Court, Southern District of California, Central Division, entered March 11, 1935, that said court erred in the following particulars:

First: That said court erred in granting the permanent injunction prayed for in said bill of complaint.

Second: That said court erred in construing the following clause in the lease annexed as Exhibit "A" to the bill of complaint, to-wit:

EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land, reserved for road purposes;

as a reservation of an easement and not as an exception of said land from said lease.

Third: That said court erred as a matter of law, in allowing the admission of the following evidence, to-wit: That it was not the intention of the parties, by the words used in the clause in the lease annexed to the bill of complaint, as Exhibit "B", to except therefrom the 40 foot strip of land described.

Fourth: That said court erred in admitting the following evidence, to-wit: That it was the intention of the parties, by the words used in the clause in the lease annexed to the bill of complaint, as Exhibit "B", to reserve an easement over the 40 foot strip of land therein described.

Fifth: That said court erred in holding that in order to ascertain the intention of the parties, by the words used in the clause excepting the 40 foot strip of land, appearing in Exhibit "B", annexed to said bill of complaint, that it was necessary to allow evidence thereof in addition to said lease.

Sixth: That said court erred in finding from the evidence that it was the intention of the parties to the lease, annexed to the bill of complaint as Exhibit "B", to reserve only an easement over, and that it was not the intention of said parties to except from said lease the 40 foot strip of land therein referred to.

Seventh: That said court erred in making the findings contained in paragraphs VII, X and XXVIII of the findings of fact, as found by said court.

Eighth: That said court erred in denying defendants Lawrence V. Lewis' and Evelyn L. Horton's motion to dismiss the bill of complaint filed herein.

WHEREFORE, appellants pray that said order and/or judgment be reversed and that such other and further relief to these appellants may be granted as may seem just and proper.

Dated, this 25th day of May, 1935.

LAWRENCE V. LEWIS and
EVELYN L. HORTON,

By L. G. Campbell

By Eugene M. Elson
Attorneys for Appellants.

[Endorsed]: Filed Jun 3 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

NOTICE OF INVITATION TO JOIN IN APPEAL OR IN LIEU THEREOF FOR ORDER OF SEVERANCE.

TO M. K. NANCE, defendant, and
TO CRAIL, SHUTT & CRAIL, his attorneys:

You, and each of you, are hereby notified that Lawrence V. Lewis and Evelyn L. Horton, defendants in the above entitled cause, intend to appeal from the judgment and/or decree entered in the above entitled court in said action on March 11, 1935, to the Circuit Court of Appeals for the Ninth Circuit.

You are hereby invited to join therein as a party appellant or be barred therefrom by order of severance, in the event you refuse to join in said appeal.

You are further notified that said parties will present to the Honorable George Cosgrave their motion for an order of severance at 10 o'clock in the forenoon of June 3, 1935, or as soon thereafter as said matter may be heard, at the courtroom of said judge, in the Federal Building, Los Angeles, California.

Dated, May 29, 1935.

L. G. Campbell
Eugene M. Elson
Attorneys for defendants LAWRENCE V. LEWIS and EVELYN L. HORTON.

Copy of the foregoing received and due service thereof acknowledged this date, and it is hereby stipulated and agreed as follows: That said motion for an order of severance herein may be heard and determined at the above time; that further or additional notice thereof is hereby waived; that notice of the filing and service of the petition for appeal, assignment of errors, praecipe in the prosecution of the appeal, statement of evidence and citation herein is hereby waived.

Dated, at Los Angeles, California, this 31st day of May 1935.

CRAIL, SHUTT & CRAIL

By Claude A. Shutt

Attorneys for defendant M. K. NANCE.

[Endorsed]: Filed May 31, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk

[Title of Court and Cause.]

ORDER OF SEVERANCE.

It appearing to the court that the judgment from which the appeal in this case is prayed was rendered against the defendants above named, to-wit, M. K. Nance, Lawrence V. Lewis and Evelyn L. Horton; and that Lawrence V. Lewis and Evelyn L. Horton have filed herein a motion for severance and an order allowing them to appeal in said cause from the judgment entered therein on March 11, 1935, without joining with them any of the other parties to the action, and it appearing that said M. K. Nance has been notified in writing to appear, and that application for such appeal would be made at this time and place, and has been requested to join therein, and has appeared and refused to join in said appeal, and the court, having considered the matter, finds the foregoing facts to be correct and that said Lawrence V. Lewis and Evelyn L. Horton are entitled to make such appeal in this cause without M. K. Nance joining therein.

IT IS THEREFORE ORDERED, that Lawrence V. Lewis and Evelyn L. Horton have leave to appeal the above cause without joining defendant M. K. Nance, and they are hereby granted a severance and right to file such a petition for appeal in this cause without joining said defendant M. K. Nance.

Dated, this 3rd day of June 1935.

Geo Cosgrave
DISTRICT JUDGE

[Endorsed]: Filed Jun 3 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That LAWRENCE V. LEWIS, one of the defendants herein, is held and firmly bound unto the Appellee, Standard Oil Company of California, a corporation, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to said Appellee, its attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made the undersigned does hereby bind himself and assigns by these presents.

WHEREAS, lately, at a regular term of the District Court of the United States in and for the Southern District of California, Central Division, sitting at Los Angeles, California, in said District, in a suit and/or proceeding pending in said Court entitled, STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Plaintiff, vs. M. K. NANCE, LAWRENCE V. LEWIS and EVELYN L. HORTON, Defendants, numbered Eq. 57-C, an order and/or judgment was entered on March 11, 1935, in favor of Standard Oil Company of California, a corporation, Plaintiff, ordering, declaring and adjudging the appellee to be the true and lawful owner of, and entitled to the possession of a certain lease, its rights and benefits, covering certain real property therein described, and permanently enjoining all defendants from doing certain acts therein specified.

WHEREAS, Lawrence V. Lewis and Evelyn L. Horton have petitioned for an appeal from said order and/or judgment, and said appeal has been allowed and filed, a copy thereof in the Clerk's office in said Court, to reverse the said order and/or judgment of the said Court in the aforesaid proceeding, and a citation directed to Standard Oil Company of California, a corporation, and M. K. Nance, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in the State of California, according to law, within thirty days from the date thereof.

NOW, THEREFORE, if the said Lawrence V. Lewis and Evelyn L. Horton shall prosecute said appeal with effect and answer and pay all costs that may be adjudged against them, if they fail to make their plea good, then the above obligation is void, otherwise to remain in full force and effect.

Dated this 10th day of June, 1935.

Lawrence V. Lewis
Principal

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

On this 11th day of June, 1935, before me, Kathryn Buckman, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Lawrence V. Lewis known to me to be the person whose name is affixed to the foregoing instrument, and acknowledged to me that he subscribed his name thereto.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] Kathryn Buckman
Notary Public in and for said County and State.

Approved this 11 day of June, 1935

Wm P. James
Judge.

Examined and recommended for approval as provided in Rule 28.

L. G. Campbell
Eugene Elson
Attorneys.

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

LAWRENCE V. LEWIS being first duly sworn, deposes and says:

That he is the principal in and the person executing the within Cost Bond on appeal; that the sum of Two Hundred and Fifty ($250.00) Dollars which he has deposited therewith is the sole and separate property of affiant.

Lawrence V. Lewis

Subscribed and sworn to before me this 11th day of June, 1935

[Seal] Kathryn Buckman

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed Jun 11, 1935. R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF SAID COURT:

SIR:

Please issue, prepare and certify Transcript of Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled proceeding, and include in such transcript the following:

1. Bill of complaint in equity, filed on or about August 31, 1933.

2. Preliminary injunction, dated September 15, 1933.

3. Answer of the defendants Lawrence V. Lewis and Evelyn L. Horton, filed on or about the 10th day of April, 1934.

4. Motion of defendants Lawrence V. Lewis and Evelyn L. Horton, to dismiss bill of complaint.

5. Minute order of court, dated March 19, 1934.

6. Order of court, dated March 20, 1934.

7. Findings of fact and conclusions of law.

8. Judgment and Decree.

9. Statement of evidence filed on or about June 1935.

10. Petition for order allowing appeal and fixing amount of bond, with order endorsed thereon.

11. Notice of invitation to join in appeal, or for order of severance, together with acknowledgment of service and stipulation endorsed thereon.

12. Order of Severance.

13. Assignment of Errors.

14. Cost bond on appeal.

15. Praecipe for transcript of record.

16. Citation on appeal.

17. Certificate of judge approving and certifying statement of evidence.

Dated, at Los Angeles, California, Aug. 28 1935.

L. G. Campbell
Eugene M. Elson
Attorneys for Appellants

[Endorsed]: Receipt of a copy of the within Praecipe is hereby acknowledged, this 28th day of August, 1935. Lawler & Degnan, by Brenton L. Metzler, attorneys for plaintiff. Filed Aug 30, 1935. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk

[Title of Court and Cause.]

COUNTER PRAECIPE

TO THE CLERK OF THE ABOVE COURT:

You are hereby requested, pursuant to the provisions of Equity Rule 75, to incorporate into the Transcript of Record on the appeal herein, in addition to the portions of the record indicated by appellants herein by their praecipe to be included in the Transcript of Record herein, the following:

1. Plaintiff's Reply to Answer of Defendants Lawrence V. Lewis and Evelyn L. Horton, which reply was filed April 20, 1934.

2. This Counter-Praecipe.

Dated this 5th day of September, 1935.

LAWLER & DEGNAN

By Brenton L. Metzler.

Attorneys for Plaintiff

[Endorsed]: Service of the within Counter Praecipe is accepted and acknowledged this 5th day of September, 1935. L. G. Campbell, L. G. Campbell, Eugene M. Elson, Eugene M. Elson, Attorneys for defendants and appellants Lawrence V. Lewis and Evelyn L. Horton. Filed Sept. 6, 1935. R. S. Zimmerman, Clerk, By Robert P Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 206 pages, numbered from 1 to 206 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellants, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; preliminary injunction; answer of defendants Lawrence V. Lewis and Evelyn L. Horton; reply to answer; motion to dismiss; minute order of March 19, 1934, denying motion to dismiss; order denying motion to dismiss; statement of evidence; findings of fact and conclusions of law; judgment and decree; petition for allowance of appeal and order allowing appeal; assignment of errors; notice of invitation to join in appeal or in lieu thereof for order of severence; order of severence; bond on appeal; praecipe and counter-praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellants herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... .... and that said amount has been paid me by the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8086

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE V. LEWIS and EVELYN L. HORTON,

Appellants,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellee,

M. K. NANCE,

Defendant.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANTS

L. G. CAMPBELL
EUGENE M. ELSON
State Building
Los Angeles, California
Attorneys for Appellants

Independent-Review, Law Printers, 222 So. Spring St., Los Angeles. TU 1377

SUBJECT INDEX

CITATIONS AND AUTHORITIES

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE V. LEWIS and EVELYN L. HORTON,

Appellants,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellee,

M. K. NANCE,

Defendant.

BRIEF FOR APPELLANTS

Statement

This action was instituted by plaintiff to quiet title to a forty (40) foot strip of land and for an injunction.

The Appellant Lewis, by a Motion to Dismiss, raised the point that the Bill of Complaint, taken in connection with all exhibits attached thereto, did not state a cause of action to quiet title in plaintiff to the strip of land in question.

The facts as alleged in the complaint leading up to the question involved are as follows:

One Elias J. Baldwin was the owner, on and prior to March 1st, 1909, of the forty (40) foot strip of land in

dispute together with other lands. Said Baldwin died on March 1st, 1909, and one H. A. Unruh was appointed executor of his estate. On September 18, 1912, Unruh, as executor and with approval of the court, sold to Walter P. Temple the whole of the real estate described in Paragraph IV, page 3 of the complaint and executed a deed to Temple, a copy of which is attached to the complaint and marked Exhibit "A". (R. 29.)

Contained in said deed from Unruh to Temple was a clause which read as follows:

> "excepting and reserving, however, for road purposes a strip of land of a uniform width of forty (40) feet, immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land." (R. 32.)

On or about August 11, 1915, Temple and wife leased to J. M. Kent *all* of the land conveyed to Temple by Unruh (which was approximately sixty acres) for oil and gas purposes. A copy of said lease is attached to the complaint and marked Exhibit "B". (R. 34.) Contained in said lease was a clause which read as follows:

> "EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land, reserved for road purposes." (R. 36.)

Thereafter, Kent assigned the lease to Standard Oil Company, a California corporation, on date of November

6, 1916. (Bill of Complaint, par. VIII.) On March 29, 1926, the said Standard Oil Company, a California corporation, assigned the lease to plaintiff Standard Oil Company of California, a Delaware Corporation. (Bill of Complaint, par. IX, and par. II.)

Since the date of the assignment to it, plaintiff has been producing oil and gas from the leasehold premises, (Bill of Complaint, par. X); plaintiff alleged that appellant asserted a right in the leasehold estate, or in and to the oil and gas therein or thereunder adverse to plaintiff and that said claims were without right "*except such as may be subject to plaintiff's leasehold estate and except an easement for road purposes only over said forty foot strip.*" (Bill of Complaint, par. XII.)

A map of the premises involved in this action was attached to the Bill of Complaint and marked Exhibit "C". (R. 44.)

Plaintiff had drilled several wells for oil upon the Temple lease which were on production, none of which however have been drilled upon the forty (40) foot strip of land heretofore and hereinafter referred to and which is the subject of controversy. (Bill of Complaint, Second Cause of Action, par. VII.) Plaintiff had also drilled several producing wells on the lease held by it on property adjoining the Temple lease. (Bill of Complaint, Second Cause of Action, par. VIII.)

On or about May 29, 1933, appellants Lewis and Horton, as lessors, leased to defendant Nance, as Lessee, the forty (40) foot strip of land described in both the Deed from Unruh to Temple and in the lease from

Temple to Kent. Said lease was for oil and gas purposes on said strip of land. (R. 44.)

Assignment of Errors

Appellants filed their assignment of errors as follows:

"First: That said court erred in granting the permanent injunction prayed for in said bill of complaint.

Second: That said court erred in construing the following clause in the lease annexed as Exhibit 'A' to the bill of complaint, to-wit:

EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land, reserved for road purposes;

as a reservation of an easement and not as an exception of said land from said lease.

Third: That said court erred as a matter of law, in allowing the admission of the following evidence, to-wit: That it was not the intention of the parties, by the words used in the clause in the lease annexed to the bill of complaint, as Exhibit 'B', to except therefrom the 40 foot strip of land described.

Fourth: That said court erred in admitting the following evidence, to-wit: That it was the intention of the parties, by the words used in the clause in the lease annexed to the bill of complaint, as Exhibit 'B', to reserve an easement over the 40 foot strip of land therein described.

Fifth: That said court erred in holding that in order to ascertain the intention of the parties, by the

words used in the clause excepting the 40 foot strip of land, appearing in Exhibit 'B', annexed to said bill of complaint, that it was necessary to allow evidence thereof in addition to said lease.

Sixth: That said court erred in finding from the evidence that it was the intention of the parties to the lease, annexed to the bill of complaint as Exhibit 'B', to reserve only an easement over, and that it was not the intention of said parties to except from said lease the 40 foot strip of land therein referred to.

Seventh: That said court erred in making the findings contained in paragraphs VII, X and XXVIII of the findings of fact, as found by said court.

Eighth: That said court erred in denying defendants Lawrence V. Lewis' and Evelyn L. Horton's motion to dismiss the bill of complaint filed herein."

Question Involved

Plaintiff's title and interest is derived from the Unruh to Temple Deed and the Temple to Kent lease, and the question involved in this case may be stated as follows: First, did the clause "EXCEPTING" the forty (40) foot strip in the lease from Temple to Kent (R. 34) constitute an "exception" of the fee thereto from the operation of the lease, or did it merely constitute a "reservation" of an easement or right of way for road purposes, the fee passing under the lease and the "easement" only remaining in the lessor; and second, was it proper for the trial court in the determination of this question to admit parol evidence.

Argument

The appellants contend that, as a matter of law alone, the clause in question excepted the forty (40) foot strip from the operation of the lease and that the parol evidence as to the intention of the parties was improperly admitted.

The difference in the meaning between an "exception" and a "reservation" is clearly set forth in the following cases:

Stone vs. Stone, 141 Ia. 438 (1909):

> "A reservation is the *creation* in behalf of the grantor *of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant,* while an exception is a clause in a deed which withdraws from its operations some part of the thing granted which would otherwise have passed to the grantee under the general description." (Italics ours.)

Pitcairn vs. Harkness, 10 Cal. App. 295 (1909):

> "An exception is always of some part of the estate, not granted at all. A reservation is always of something taken back out of that which was clearly granted."

Thus, having the clear distinction in definition between the two terms, we now examine the rules governing the construction to be given "exceptions" and "reservations" and the application of those rules.

Rules of Construction—Execptions and Reservations

It cannot be questioned that whether a clause in an instrument constitutes an "exception" or a "reservation" must be determined from the instrument itself, the intention of the parties as manifested by the instrument to govern, regardless of the use of either of the terms.

9 *Cal. Jur.*, p. 324, Sec. 188, "Deeds."

The court also should not presume an intention not indicated by the language used by the parties.

Sears vs. Ackerman, 138 Cal. 583 (1903).

A "reservation" is interpreted in California in favor of the grantor by express statutory provision, thus differing from the rule in other jurisdictions.

Civil Code, Section 1069;
Code of Civil Procedure, Section 1864.

The same rule also applies to the construction of "exceptions."

Hartwig vs. Central-Gaither Union School Dist., 200 Cal. 425 (1927);
Yuba Inv. Co. vs. Yuba Consol. Gold Fields, 184 Cal. 469 at page 481 (1920);
Sears vs. Ackerman, supra.

The Intention of the Parties as Manifested by the Various Instruments is Clear That the "Exception" in the Temple to Kent Lease Constituted an Exception of the Fee to the Forty (40) Foot Strip.

It is conceded that the clause in the *deed* (R. 29) from Unruh to Temple "excepting and reserving" the forty

(40) foot strip operated as a reservation of an easement to Unruh "for road purposes," and that in the *deed* from Unruh to Temple, the fee to the forty (40) foot strip passed to Temple with an easement reserved to Unruh in that strip "for road purposes."

The disagreement is on only one proposition, namely, whether the clause in the *lease* from Temple to Kent "excepted" or withdrew from the leased premises the forty (40) foot strip. Respondent claims that the fee was not "excepted" or withdrawn from the operation of the *lease,* but passed as part of the leasehold premises to Kent and that only a "reservation" or right "for road purposes" was reserved or created in favor of Unruh. Appellants deny this as heretofore stated.

The deed from Unruh to Temple immediately following the clause "Excepting and reserving" the forty (40) foot strip "for road purposes," contains the following language (R. 32):

> "and said grantee, for himself, his heirs and assigns in accepting this deed, agrees on demand to join with said grantor, his successors, or the owners for the time being, in dedicating to and for public highway purposes said strip of land so reserved."

It is obvious therefore that inasmuch as that clause requires Temple to join with Unruh in dedicating the forty (40) foot strip reserved to Unruh for public highway purposes, Temple would have been unable to comply therewith if he had leased the fee thereto to Kent; in fact that result would have obtained if he had done anything other than keep the fee in himself, for if he had merely

reserved the strip for road purposes, the fee, under the accepted definition of a "reservation" would have passed to the lessee under the lease. The intention of the parties in the Temple to Kent lease to carry out the provisions of this clause could not have been otherwise than to withdraw the fee to the strip from the leased premises—to "except' therefrom that strip so that the land embracing the strip should not constitute any part of the leased premises.

Let us turn again to the two clauses in question. The clause in the Unruh to Temple *deed* says "excepting and reserv*ing* * * * for road purposes." (R. 32). The right, reservation or easement was created by those words and "reserving" was therefore used in the present tense. The clause (R. 36) in the Temple to Kent *lease,* however, uses the word in capital letters "EXCEPTING" and then after describing the land excepted says, "reserv*ed* for road purposes"; reserved here being used in the past tense as contra-distinguished from its use in the present tense in the Unruh to Temple *deed.* It is obvious that the parties in the *lease* were referring to what had been reserv*ed* to Unruh by the prior instrument, the deed. Their meaning is clear and to construe it otherwise would violate the rules of construction heretofore referred to that exceptions and reservations are to be construed in favor of the grantor and against the grantee; also that an intention is not to be presumed which is not clearly indicated by the language used. A different construction would manifestly presume such an intention.

It is apparent upon examination that the parties knew and recognized the distinction between an "exception"

and a "reservation." In the lease, the following language is used:

> "Said first party (the lessor) hereby *reserves* the right to occupy and use said land, or to lease the same, or any part thereof, for agricultural or grazing purposes." (R. 37.)

The parties were cataloguing the uses to which the surface of the leased premises might be put. If, as respondent claims, Temple, the lessor, merely intended to reserve the right to use the surface of the forty (40) foot strip for a road, by the language used in the "EXCEPTING" clause, he would either have included that reservation in the catalogue of uses just set forth or would have at least used the same language in "reserving" it that he did when "reserving" the right to lease for agricultural uses.

Also in the lease, immediately following the clause in controversy, is contained "EXCEPTING THEREFROM"; (that is, the leased premises), two (2) acres of land. (R. 36). That the parties unequivocally and unmistakably intended that two acres were to be "excepted" from the leased premises and therefore were fully cognizant of the meaning of the term "excepting" and intended to use it in the manner in which it is defined, will be seen from an examination of the following portion of said lease:

> "It is further understood and agreed, that the first party shall not in anywise, nor at any time during the currency of this lease, bore, mine, sink or drill any well or wells for the development and extraction of

any oil, petroleum or other petroleum or hydrocarbon substances, or permit, cause or suffer anyone to bore, sink, mine or drill any such well or wells for any such purposes *upon the said two acres* of land *hereinbefore referred to as excepted* from this lease. (R. 42.)

"And, in further consideration of this lease, it is agreed that, if the said first party shall at any time desire to sell or lease the said two acres of land or any part thereof, then he shall not lease or sell or cause, suffer or permit anyone to lease or purchase the same without first giving the second party herein the sole, exclusive and prior right and option to lease or purchase said two acres of land upon as favorable terms and conditions as any other bona fide lessee or purchaser might be willing to take or buy the same; but if any other person or persons should lease or buy said two acres, or any part thereof, then, and in that event, such purchaser or lessee shall take said land subject to the terms and conditions of this lease." (R. 42-43).

Thus, when the parties used the words "EXCEPTING THEREFROM," the two (2) acres in the lower portion of the land they knew clearly the meaning of the words used, for by the above quoted paragraphs they recognized and conceded that *title to the fee* to the land thus *excepted* was in the lessor—had been withdrawn by him by that clause at the time of execution of the lease. In view of this fact, it can hardly be said that, when using the same language in a previous clause, they intended an entirely different meaning to be given to it.

It is settled law that a "reservation" is made for the benefit of the grantor. (*Sears v. Ackerman* and *Pitcairn*

v. Harkness, supra). The deed from Unruh to Temple reserved to Unruh the easement for road purposes over the forty (40) foot strip. When Temple executed his lease to Kent, that easement or reservation was still in Unruh—it belonged to him; therefore if the clause in the Temple to Kent lease is construed as a "reservation" rather than an "exception" of the fee to the strip, it would be "reserving" something to Temple which could not in anywise benefit him for it already belonged to someone else—Unruh. A "reservation" is the creation by the instrument of a *new right;* one which did not exist before. Obviously, no "reservation" could be created by Temple in the forty (40) foot strip by his lease for that right had already been created and belonged to someone else.

The following is helpful to further illustrate this point:

4 *Thompson, Real Property,* Sec. 3255, p. 365:

> "If the intent of the deed is to vest in the grantor some new right or interest which did not before exist in him it is a reservation; but if it was the plain purpose of the parties not to reserve a new right which should vest in the grantor, but to recognize and except from the grant an existing right which would otherwise pass to the grantee it is an exception."

In the Temple lease the parties could not "vest in the grantor" a "new right" as that right belonged to Unruh; "the plain purpose of the parties" was clearly "to recognize and except from the grant" the fee over which "an existing right" might be used.

4 *Thompson, Real property,* Sec. 3258, p. 368:

> "A reservation of an existing right may properly be construed as an exception. Where a right did not formerly exist, but was called into being by the deed, it was a reservation and not an exception."

The "right" so-called did "formerly exist"; in fact it was then existing in Unruh.

A Reservation to a Stranger is Void

If the contention of respondent be adopted that the clause in the Temple to Kent *lease* created a reservation, we would immediately be confronted with the proposition that a reservation in favor of a stranger to the instrument is void. That such a reservation would be one in favor of a stranger to the instrument is apparent. It appears that Unruh had already reserved a right or easement in the strip for road purposes. That right was already in Unruh, *a stranger to the lease;* Temple could not reserve it for himself or do other than reserve it for Unruh which would be meaningless, for we have already stated, Unruh had it. A reservation to Temple for an easement would therefore be meaningless. Our authority for this proposition is stated in 4 *Thompson, Real Property,* Sec. 3280, p. 393:

> "A reservation to a third person not a party to the deed is void."

The same author in *Section 3281, p. 395* of the same work states as follows:

> "But although a reservation will not give any title to a stranger, it may operate as an exception to the

grant, if such appears to be the intention of the parties * * * The Supreme Court of Michigan in a recent case (Martin v. Cook, 102 Mich. 267, 60 N. W. 679) says: 'From an examination of the cases cited, and the decisions of the courts of this country generally upon the question here involved, it will be observed that while the rule that a reservation in favor of a stranger to the instrument is invalid as a reservation has been adhered to, yet, in order to effectuate the intention of the grantor, such a reservation has uniformly been treated as excepting from the grant the thing reserved. Nor has this holding been confined to cases where the reservation has been previously carved out * * *.'

"This is true even though the stranger takes nothing. Corning vs. Troy Iron & Nail Factory, 40 N. Y. 191)."

So we see by the foregoing that to adopt the construction contended for by plaintiff would force upon the parties to the instruments a void reservation—it being in favor of a stranger to the lease, Unruh. Even though, however thus construed it would be invalid as being in favor of a stranger, the clause would be, under the authority cited, construed as an exception, and this would be true even though under the Temple lease Unruh would take nothing, (he being unable to as having already reserved it to himself) by reason of the clause of the lease in controversy.

Authorities Relied Upon by Appellants

Moakley vs. Blog, 90 Cal. App. 96 (1928), was an action to quiet title. Defendants recovered judgment and

plaintiff appealed. There were two conveyances involved, the first from Lyman and others conveyed to the railway company a certain parcel of land. The deed contained a metes and bounds description of a strip of land 35 feet wide running diagonally through the property of the grantors. The conveyance contained a paragraph which read as follows (page 97):

> "This conveyance is given and accepted upon the express understanding and condition that said strip of land is to be used for a right of way for constructing and maintaining a railroad over and along the same by the grantee herein or its successors or assigns and for no other purpose, and that if at any time it shall cease to be used for that purpose it shall immediately thereupon revert and revest in the grantors herein, their heirs or assigns without any further or other conveyance from said grantee or its successors or assigns."

Some years later the grantors conveyed all of their property to Willmon. Willmon was the common grantor of the parties to the action. Willmon then conveyed to Stimson. Stimson then conveyed to others, who, in turn conveyed to defendant Blog. The deed from Willmon to Stimson contained the following language after describing the land by metes and bounds (page 97):

> "Except right of way for the Los Angeles Pacific Railway Company over strip thirty-five feet wide as granted by deed recorded in * * *."

Later Willmon who had previously conveyed to Stimson (from whom defendant claimed title), conveyed or

quitclaimed the strip of land in dispute to plaintiffs. The railway company subsequently abandoned the strip. The deed of the strip conveyed all of the reversion. The question involved in the case is stated on page 98:

> "When Willmon conveyed to Stimson in 1903, did he pass title to the land in the railway strip, or the reversion therein, so that upon the subsequent abandonment of the railway, (defendants) became the owners thereof? If not, then Willmon retained the title to this strip at that time, or the reversionary interest therein, and passed it to plaintiffs by his deed of August 7, 1923."

Defendant claimed that the Willmon-Stimson deed conveyed all of the land within the exterior boundaries of the description in that deed and excepted only a right of way for the railway. Plaintiff claimed that the deed by the exception, excepted from the land conveyed the whole fee of the strip occupied by the railway tracks and that the deed, therefore, is to be construed the same as though it described two pieces of land, each bounded by the railway strip. The court said on page 98:

> "The important distinction between an exception of a right of way and an exception of the land upon which the right of way is situated is pointed out in Hall vs. Wabash Ry. Co., 133 Iowa 716 (110 N. W. 1040), cited by (plaintiff). There, the exception in the deed was 'excepting the part occupied by the right of way of the railway company.' The court said: 'It was the soil itself that was in terms excepted from the grant, not merely the right of way.'
>
> "Again in Pritchard vs. Lewis, 125 Wis. 604, (110 Am. St. Rep. 873, 1 L. R. A. (N.S.) 565, 104 N. W.

> 989), the exception in the grant was 'a strip of land two rods in width off the north side thereof to be used as a right of way,' the decision reads: 'The deed to Lewis in plain terms excepts and reserves the two rods for a right of way, not a right of way over two rods . . . which quite plainly imports that the fee was intended to be reserved."

Plaintiff then contended that because the Lyman deed passed the fee, that the Willmon deed excepting by reference the land granted by the first deed, likewise reserved the fee or excepted it. The court held otherwise however and stated on page 100:

> "In all the authorities relied on by appellants (plaintiffs) the exceptions except land itself by such expressions as 'reserving a strip of land,' 'excepting from the effect and operation of the conveyance four square miles, etc.,' and 'excepting the part occupied by the right of way, etc.' Where, on the other hand, the exception is 'saving and preserving the road' it has been held that the fee was not reserved in the part. (Bokio vs. Marvin, 130 Mich. 82, 89 N. W. 563) and cases cited therein."

We do not question the correctness of the conclusion of the court in that case that the clause excepting "a right of way" was not an exception of the fee but merely a reservation of a right of way; the "soil itself" was not excepted as was done in the instant case. As in the majority of cases upon the subject the terms exception and reservation are used loosely in the opinion, the meaning however being clear. The quoted portions of the *Moakley* case are direct authority for defendants' conten-

tion that the fee was excepted or withdrawn to the strip from the operation of the Temple lease. In the present case "it was the soil itself that was in terms excepted from the grant (lease), not merely the right of way." The Temple lease recited: "EXCEPTING a strip of land." The parties could not otherwise have more clearly excepted "the soil itself." That strip of land so withdrawn from the operation of the lease had been previously reserved for road purposes by Unruh and the clause in the lease so states, "reserved for road purposes." By the very terms used in the excepting clause of the lease taken in connection with the last cited case the clause in the Temple lease must be taken as having excepted or withdrawn the fee to the strip. We emphasize the fact that the clause did not say "Excepting the right of way for a road" or "excepting the right of way"; it excepted the strip of land *itself*. The foregoing case is conclusive of such construction. A contrary construction would do violence to the words used and "presume an intention not indicated by the words used" which cannot be done. Furthermore it would amount to a clear construction against Temple and in favor of Kent which also does violence to the statutory rule of construction existing in California. (*Sears vs. Ackerman, supra.*)

Delano vs. Luedinghaus (Wash. 1912), 127 Pac. 197, involved the following facts: Defendants owned some land on which they had been for some time operating a saw mill. In 1907 they conveyed a part of the land to Smith describing the conveyed portion by metes and bounds and concluding as follows (page 197):

> "Containing 1.21 acres more or less, excepting a strip of land thirty feet wide on the north side of said R. R. right of way for road purposes."

Thereafter, Smith conveyed to plaintiff. Defendant had for some time been conveying other tracts with similar exceptions. They owned timber lands to the west of the tract conveyed and had built a private logging railroad along and over the 30 foot strip. Plaintiff brought this action to restrain defendants from further operating the road and for damages on the theory that the exception in the deed operated as a reservation of an easement only in defendants and that they could not put it to any use other than for ordinary highway purposes; that the building and operation of a steam railroad was an additional servitude. The court said on page 197:

> "The only question before us is the effect of the words 'excepting . . . for road purposes.' It will be noticed that the description includes the 30 foot strip. It is argued that this indicates a grant and reservation. Such descriptions are the most convenient, and deeds are usually made in that form whether the fee is retained or an easement only is reserved."

The court then proceeded to discuss the intention of the parties, to the effect that defendants owned all of the timber land and could not operate a sawmill without the operation of a road and that the intent of the parties must have been that the fee to the strip was excepted, for it could not be presumed that the grant was made with the intention that only an easement was reserved

for ordinary road purposes and that if a different use was intended defendant would have to condemn the strip. The court stated further on page 198:

> "Reservations and exceptions are almost invariably made for the benefit of the grantor, and, when so made, courts will not resort to technical rules to defeat or limit them."

The court then concluded that as a fee was excepted in the strip, the grantor could put the strip to any use that he saw fit.

Munn vs. Worell, 53 N. Y. 44 (1873), involved a grant by metes and bounds "but saving and excepting from the premises hereby conveyed all and so much and such part and parts thereof as has or have been lawfully taken for a public road or roads." The court said:

> *"The exception does not purport to be of any particular estate or interest in the land, but is in terms of a certain part and parcel of the premises embraced within the boundaries set forth in the deed.* It is not an exception from the estate of the grantor, but from the premises and specifies the portion excepted . . . None of the cases referred to present the feature which exists in the present case, of an exception *from the premises* described, of a specific portion of *such premises.*" (First italics ours.)

Wood vs. Boyd (Mass. 1887), 13 N. E. 476, was an action for damages for breach of covenant in a deed from defendant to plaintiff. Plaintiff's lot was formerly owned by one Heard. Heard conveyed to one Estabrook by a deed containing the following clause:

> "Reserving to said Heard his heirs and assigns the right of passage way from his dwelling house to the turnpike aforesaid, and through the premises as the same is now enjoyed."

The right of way was conveyed by mesne conveyances from Heard to one Earle. Plaintiff claimed that the right of way was an incumbrance on his estate and constituted a breach of covenant against incumbrances. The deed to plaintiff contained the following clause:

> "Reserving to the owner of the estate and other adjoining on the south, a right of passageway over the within granted premises as specified. . . ."

The descriptions were by metes and bounds, following which were the above clauses. The court stated at page 478:

> "The plain purpose of the parties was not to reserve any new right, which should vest in the grantor, but to recognize and except from the grant, rights of way existing, by prior grants in third persons who were not parties to the deed. . . . 'The granted premises which are covenanted to be free from incumbrances, is not the land in fee, but the fee diminished by existing easements, which are excepted out of the grant.' Such easements are not incumbrances upon the 'granted premises.' They are excepted as they existed—that is as perpetual easements."

As in the case at bar, "the plain purpose of the parties was not to reserve any new right, which should vest in the grantor" for none could be reserved by Temple; it

already existed in Uuruh, "but to recognize and except from the grant (lease)" the fee over which a right of way (in Unruh) already existed.

In *Home vs. Saddler,* 15 Ky. L. 765, 25 S. W. 277, it was held that an exception out of the land described by metes and bounds, of a part covered by a certain lease, was an exception of the fee of such part; that if it had been intended to convey the whole parcel, this would naturally have been done simply by adding the words, "subject to the lease." Exactly as in the present case if the parties had thought or intended in the lease to merely reserve a right of way, inasmuch as it had already been created by the Unruh deed, "this would naturally have been done simply by adding the words, 'subject to the lease'." The unmistakable intention of the parties to the lease to except or withdraw the fee to the strip considered in connection with the last case cited may be seen from examining page 2, lines 22 to 27 inclusive of the lease wherein the parties did lease "subject to" a right to construct poles and towers over a portion of the land. If they had likewise intended merely to preserve a right of way for road purposes over the forty foot strip they would have done the same; leased subject to reservations of record, for the reservation of Unruh was already of record by virtue of his deed to Temple.

Reynolds vs. Gaertner (Mich. 1898), 76 N. W. 3, was an action in ejectment. Plaintiff owned some land and conveyed the strip in dispute to a Railway Company. The strip was subsequently abandoned by the Railway Company and defendant took possession thereof claiming a

right to do so under a deed previously executed in his favor by plaintiff. The deed to defendant recited the following:

> "The north one-half of the northeast quarter, except two and forty-six hundredths acres to the Chicago and Canadian Southern R. R. in section thirty-three. . . ."

The lower court found that the deed from plaintiff to defendant conveyed the strip to defendant and found for defendant. Defendant's contention was that the conveyance to the Railway Company was only of a right of way, an easement, and that the company was not entitled to take and hold more than that, and that plaintiff, in his deed to defendant meant to except only that which was granted to the Railway Company, to-wit, an easement. The court said on page 4:

> "The deed is not susceptible of such construction. The language (of the exception) means that plaintiff conveyed to the defendant all the land described, excepting therefrom 2.46 acres. It is the general rule that, where a general description in a deed is followed by a clause stating the intention of the parties as to the premises conveyed, such clause will have a controlling effect upon all prior phrases used in the description." REVERSED.

As in the present case *the land itself* was excepted from the lease.

Hall vs. Wabash (Ia. 1907), 110 N. W. 1039, involved an action by plaintiff to recover damages for the use by defendant of an abandoned right of way. A railway

company acquired certain rights of way over the land and the deed was recorded. Plaintiff's deed which was subsequent to the deed of the right of way to the railway company, contained the following language:

> "excepting the part occupied by the right of way of the Iowa Central Railroad Company."

On page 1040 the court stated:

> "This exception is clear and unequivocal and no title to the land embraced in the right of way passed. . . . We do not see how an exception could be more definite, or how the intent of the grantor could be made plainer. The railway company then had a recorded deed of the right of way. An exception in the grant of the right of way alone would mean nothing, and, unless the exception in question withheld from the grant the strip of land so occupied, it is meaningless. It was the soil itself that was in terms excepted from the grant, and not merely the right of way." (REVERSED).

With regard to the point that we have repeatedly stressed herein, the above case is "on all fours" with the contention that we make; that inasmuch as Unruh already had the easement for a right of way by virtue of his deed to Temple, and that deed recorded, to construe as plaintiff herein would have it, the disputed clause in the Temple to Kent lease as a reservation of an easement only "would mean nothing" as stated in the above case. Furthermore as in that case, the Temple lease in the present action excepted the soil itself. A more direct and conclusive authority for defendants' contention could not be found than the foregoing decision.

Pritchard vs. Lewis (Wis. 1905), 104 N. W. 989, involved an action to remove a cloud from land. The deed in question described the granted land by metes and bounds and then contained an exception referred to in the quoted portion which follows and which was announced by the court on page 991:

> "The deed to Lewis in plain terms excepts and reserves the two rods for a right of way, not a right of way over the two rods, but 'a strip of land two rods in width off the north side thereof, to be used as a right of way', which quite plainly imports that the fee was intended to be reserved."

The lease from Temple to Kent "in plain terms excepts" "a strip of land of a uniform width of forty (40) feet." It does not except or reserve a right for a road over said strip of land.

Spillman vs. Brown, 45 Fed. 291 (1891), also involved an action to remove a cloud. Plaintiffs alleged that they were the owners in fee of a tract of land of 40 acres which was conveyed to them by one Taylor. The land was subject to an oil lease embracing 30 acres executed prior to the deed from Taylor to plaintiffs. Defendant denied that only 30 acres were conveyed by the lease and claimed that the lease covered the entire 40 acres. The lease contained a provision that:

> "no wells shall be drilled without the consent of the grantor upon the ten acres."

Defendant claimed that the above quoted clause was a limitation on the right of the lessee (defendant) to drill

on the 10 acres and that it was no more than that. The lease in question described the property by metes and bounds and then contained the following:

"excepting reserved therefrom 10 acres."

The court held that an exception is a taking out of a part of the thing otherwise granted and not of some other thing or right, and that the clause above quoted therefore amounted to an exception. In other words, the land itself, 10 acres, was withheld from the conveyance, not some other thing or right taken back. Likewise in the Temple lease the land itself was withheld from the conveyance, a strip 40 feet wide, not some other thing or right taken back after the conveyance was made.

Respectfully submitted,

L. G. Campbell,
Eugene M. Elson,
Attorneys for Appellants.

No. 8086.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Lawrence V. Lewis and Evelyn L. Horton,

Appellants,

vs.

Standard Oil Company of California, a corporation,

Appellee,

M. K. Nance,

Defendant.

BRIEF FOR APPELLEE.

LAWLER & DEGNAN,
MAX FELIX,
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No. 8086.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Lawrence V. Lewis and Evelyn L. Horton,

Appellants,

vs.

Standard Oil Company of California, a corporation,

Appellee,

M. K. Nance,

Defendant.

BRIEF FOR APPELLEE.

INTRODUCTORY STATEMENT.

This suit in equity was brought by plaintiff, Standard Oil Company of California, as lessee under an oil and gas lease, to quiet its sole and exclusive right to bore for, extract and remove the oil, gas, asphaltum and water in and under the real property in the lease described, and for injunctive relief. After trial on the merits in the District Court, decree was entered for plaintiff. This is an appeal by the defendants Lewis and Horton from that decree.

STATEMENT OF QUESTION INVOLVED.

The pivotal question involved may be thus stated:

Is the following clause at the foot of the metes and bounds description in the lease [R. p. 36]:

> "EXCEPTING a strip of land of a uniform width of forty (40) feet immediately along and adjoining on the Easterly and South Easterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land, reserved for road purposes,"

to be construed as withholding all estate in such strip, inclusive of the minerals thereunder, or as withholding an easement for road purposes?

STATEMENT OF FACTS.

The statement of facts tendered by Appellants' Brief (pp. 1 to 4) is inadequate to a true understanding of the case. To aid the court the following is submitted:

Prior to his death in 1909 Elias J. Baldwin was the owner of a large tract of land lying in the hills north of Montebello, California. Oil had not yet been discovered in the locality. It was not until 1917 that oil was found.

Upon Baldwin's death, H. A. Unruh qualified as his executor. In the fall of 1912, while the Baldwin estate was still in probate, Unruh, as executor, sold a portion of the Montebello acreage to Walter P. Temple. [R. p. 29.] The tract purchased by Temple consisted of slightly less than 60 acres. [R. p. 29.]

A concept of the relative size and location of the Temple purchase and of the property retained by the Baldwin estate may be obtained by referring to the map, Exhibit

"D," facing page 44 of the transcript of record. The tract there marked "Standard Oil Company-Temple Lease" depicts the area acquired by Temple from Unruh, while the larger area almost surrounding it and marked "Standard Oil Company-Baldwin Lease" depicts a portion of the extensive holdings retained by the Baldwins.

In the negotiations between Unruh and Temple, the latter was represented by Milton Kauffman, an appraiser and real estate man. [R. p. 113.] Kauffman had been associated with Temple for some time and accordingly handled the details of the transaction for Temple. [R. p. 113.]

During the negotiations Unruh told Kauffman that he, Unruh, wanted to have a "reservation for a road" that would be of benefit to the remaining property, and which might eventually connect up with the Montebello district. [R. p. 113.] Accordingly, in the deed from Unruh to Temple, following the metes and bounds description of the property conveyed, the following clause was inserted:

> "Excepting and reserving, however, for road purposes, a strip of land of a uniform width of forty (40) feet, immediately along and adjoining on the Easterly and Southeasterly side of the entire length of the Westerly and Northwesterly boundary line of said two parcels of land." [R. p. 32.]

It is significant that Appellants, in their brief, concede that the above quoted language of the Unruh deed reserved merely an easement for road purposes, and that under the deed the fee passed. (Brief*, pp. 7, 8.)

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*"Brief," as used herein, means "Appellants' Brief."

In the summer of 1915 J. M. Kent, an oil man, conceived that there was oil in the Montebello hills. [R. p. 109.] Upon communicating his belief to an officer of Standard Oil Company he was encouraged to undertake leasing. [R. p. 109.] Kent then opened negotiations with Temple for a lease of Temple's property. [R. p. 109.] The lease which resulted from Temple to Kent is the lease now held by Appellee [Exhibit 1-a, R. p. 86], commonly known and referred to as the "Temple Lease."

Kent's testimony concerning the transaction is lucid:

During the negotiations Temple informed Kent that a man named Levy had held a lease on the property, but had forfeited. [R. p. 109.] Temple showed Kent a copy of the Levy lease. This Kent examined. Kent noticed in it a clause relating to the 40-foot strip. [R. pp. 109, 110.] Upon inquiry as to the meaning of the clause, Kent was told by Temple that "it was for road purposes only, an easement for road purposes only." [R. p. 111.] The Temple lease, later prepared, "practically covered" the Levy lease. [R. p. 111.]

While he was negotiating with Temple, Kent was likewise endeavoring to obtain a lease of the Baldwin property, and so informed Temple. [R. p. 110.] Kent told Temple that the leases (Temple and Baldwin) were to go to Standard Oil Company, but that they (the leases) could not be taken unless the properties adjoined each other. [R. p. 110.]

On one occasion during the negotiations Kent went out with Temple to view the boundaries of the property. They drove along San Gabriel Boulevard to what Temple spoke of as the line between his and the Baldwin property. [R. p. 110.] Kent there saw a fence running at right

angles to San Gabriel Boulevard. Temple stated that this fence was where his line was and that the Baldwins owned the property on the other side. The line was pointed out for the purpose of showing Kent what would be included in the lease. [R. p. 111.]

After the Temple lease was prepared it was handed to Kent by Temple for execution. [R. p. 111.] During the conversation ensuing the 40-foot strip clause was mentioned. Temple said the strip was for road purposes only. He wanted to reserve the surface rights. [R. p. 112.]

The Temple lease was then executed. It contained at the foot of the metes and bounds description the clause quoted under the "Statement of Question Involved." [R. p. 88.]

Subsequently Standard Oil Company acquired the Baldwin lease [R. p. 96], and, by assignment from Kent shortly afterward, the Temple lease. [R. p. 107.] Since then the two properties have been developed and operated in conjunction. [R. p. 139.] Many wells have been drilled. These are shown on the map, Exhibit 17, facing page 138 of the transcript of record.

Standard Oil Company, and plaintiff, Standard Oil Company of California, its successor, have maintained constant possession of the Baldwin and Temple leases. [R. p. 135.] From an early date, pipe lines and power lines were freely constructed across the 40-foot strip. Some of the power poles even rested upon the strip. Standard did these things openly. [R. p. 137.] Temple visited the property frequently. [R. p. 154.] No one was heard to object to the installation of these facilities. [R. p. 154.]

Standard also improved, widened and graveled a road for its use over portions of the 40-foot strip. [R. p. 147.] A boiler plant serving both the Temple and Baldwin leases rested partially thereon. [R. p. 140.]

Under the Temple lease, taxes upon mineral rights were apportioned as follows: Lessor to pay one-eighth, lessee to pay seven-eighths. [R. p. 95.] After oil was discovered, tax receipts or statements were regularly sent Standard by Temple with request for payment of Standard's share. [R. pp. 115-116-118.] The tax receipts or certificates so sent Standard by Temple described the outer boundaries of the Temple property. [R. p. 118.] Standard paid the taxes on that basis. [R. pp. 116 to 118.] As stated by Kauffman, Temple's agent and manager, concerning one such instance

> "And the bill that we sent to the Standard and upon which we collected that two hundred odd dollars of money was bill describing the true boundaries of that property and which I said and Temple said was under the lease." [R. p. 118.]

Temple always spoke of the tract as "the 60-acre tract." He assumed that the 60-acre tract covered everything, including the road. He assumed that there were sixty acres within the outer boundaries described in the Unruh deed. [R. p. 144.] As he testified, he "acquired from the Baldwins an area which he thought was sixty acres." [R. p. 144.] In November, 1918, Temple wrote Standard, referring to the sixty acres, as follows [R. p. 145]:

> "Dear Sirs: As I have not received a statement from the County Tax Collector I am writing you to find out that the payment I made you of $1159.36 on July first of this year included all the real and per-

sonal *taxes on the 60 acres you have under lease from me.** Kindly look this matter up and let me hear from you as soon as possible, as the taxes are delinquent the end of this month.

Truly yours,

(Signed) WALTER P. TEMPLE."

From the time the Temple lease was made, in 1915, until about two months before this suit was filed in 1933, there was never a suggestion that anyone claimed a right to drill the 40-foot strip or claimed the restrictive clause in the Temple lease withheld all estate therein.

Then in 1933 defendants Lewis and Horton appeared. They obtained a series of quitclaim deeds from Temple and the Baldwin heirs, relating to the Temple property and the 40-foot strip. [R. pp. 150 to 153.] The first of these dated June 10, 1933, from Temple to Lewis and Horton, recited as a consideration $75.00 a month to be paid Temple during the period to and including June, 1935. [R. p. 150.] Such was the consideration for a transfer purporting to embrace a strip 40 feet wide by 2440 feet long, with an area of 2.22 acres, in the heart of a producing oil field.

After the quitclaims were obtained, an oil lease purporting to cover the 40-foot strip was made by Lewis and Horton to defendant Nance. [R. pp. 44, 153.] Nance then entered upon the strip and commenced preparations for drilling. [R. pp. 141-142.] This suit promptly followed.

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*Italics herein ours, unless otherwise noted.

ARGUMENT.

Relying as they do upon a quitclaim deed from Temple (executed long after the Temple lease), Appellants are confronted at the threshold of the case with this dilemma: Substantially the same restrictive language relating to the 40-foot strip is found in the Unruh deed to Temple as in the Temple lease to Kent. If appellants were to contend that the language of the Unruh deed to Temple withheld all interest in the strip, this would mean that appellants could acquire no interest in the strip by virtue of their quitclaim deed from Temple. Accordingly Appellants are compelled to concede that the Unruh to Temple deed reserved only an easement for road purposes, and that by it Temple acquired the fee of the strip. (Brief, p. 78.) Despite the substantial similarity of the restrictive language in said deed and in the lease from Temple to Kent, Appellants nevertheless argue that each had an opposite effect, and that by the language in the lease no interest whatsoever in the 40-foot strip passed to Kent.

POINT I.

Use of the Words "Reserving" or "Excepting" Is Not Determinative. The Real Intention of the Parties Must Be Ascertained and Given Effect Regardless of the Term Employed.

> "While the difference between reservations and exceptions is well defined (Lange v. Waters, 156 Cal. 142 (19 Ann. Cas. 1207, 103 Pac. 889)), it is universally held that the use of the word 'excepting' or 'reserving' is not alone determinative of the question, but that the effort of the court should be to con-

strue the whole conveyance for the purpose of ascertaining the real intention of the parties and to give it effect accordingly, regardless of the use of the appropriate terms 'reserving' or 'excepting.' (Painter v. Pasadena L. & W. Co., 91 Cal. 81 (27 Pac. 539); 2 Devlin on Deeds, secs. 980, 980a.)"

Coon v. Sonoma Magnesite Co., 182 Cal. 597, 600.

"Such clauses are to be given a reasonable construction according to the intention of the parties as ascertained from the entire instrument *together with the attendant facts and circumstances* which were before the parties at the time of making the deed (18 Cor. Jur., Deeds, sec. 350, p. 346; *Pitcairn v. Harkness,* 10 Cal. App. 295 (101 Pac. 809).) These questions are primarily for the trial court (*Thompson v. McKenna,* 22 Cal. App. 129 (133 Pac. 512)); and where its construction appears to be consistent with the true intent of the parties an appellate court will not substitute another although it may seem equally tenable (*Kautz v. Zurich etc. Ins. Co.,* 212 Cal. 576 (300 Pac. 34).)"

Moakley v. Los Angeles Pacific Ry. Co., 139 Cal. App. 421, at 426.

"While the distinction between a reservation and exception is clearly marked, it is said to be so slight and shadowy that in common parlance the terms are used interchangeably, and the technical meaning will give way to the manifest intent, even though the technical term to the contrary be used."

9 *Cal. Jur.* 324, and cases there cited.

POINT II.

Settled Rules of Construction Compel the Conclusion That by Its Restrictive Clause the Temple Lease Withheld Only an Easement for Road Purposes.

A. Words Showing Purpose Control in Ascertaining Intent. The Phrase "for Road Purposes" Modifies the Whole Clause and Results in Retention of an Easement.

In *Coon v. Sonoma Magnesite Co.,* 182 Cal. 597, the California Supreme Court construed language having singular resemblance to that employed in the Temple lease. There a deed to part of a section of land contained the following clause:

> "saving and excepting therefrom a strip of land forty feet wide along the banks of the east fork of Austin Creek all the way across the said land, for a road to be built at some future time."

The question was whether the fee or an easement was retained.

After pointing out that use of the word "excepting" or "reserving" was not determinative, the court said:

> "The only language in the clause under consideration which indicates that the intent of the parties was to reserve the *fee* is the provision for the 'exception' of a strip of 'land.' *The fact that this is a strip forty feet wide* which meanders a stream, *and is to be used for a road, is, however, an indication that the parties contemplated an easement rather than an exception.* It is evident that the parties had in mind the construction of a road which would be beneficial to both parties. Until such road was constructed, the grantee would have the right to use this strip as well

> as the balance of the land for any suitable purpose, and thereafter for any purpose not inconsistent with the easement. *The phrase 'for a road' modifies the whole clause."*

Held: The restrictive language reserved an easement for a road. It did not except the fee.

Just as the phrase "for a road" modified the restrictive clause in the *Coon* case, so the words "for road purposes" in the Temple lease control here.

Similarly in *Abraham v. Abbott,* 8 Or. 53, the words

> "except a strip off of the north and west sides thereof thirty feet wide, and a strip off of the east side thereof twenty feet wide, reserved for a road."

were held to create an easement, not to withhold the fee.

Likewise in *Elliot v. Small* (Minn.), 29 N. W. 158, the words

> "reserving from said grant a strip thirty-three feet in width, on the south side of said tract, for a public street, and a strip thirty-three feet on the east side, which is now used and occupied as a public road and highway."

withheld only an easement, not the fee.

In *Pitcairn v. Harkness,* 10 Cal. App. 295, where the words were

> "reserving therefrom a strip of land twenty-five feet wide off the east side for street purposes."

it was held that only an easement for street purposes was reserved.

Other cases illustrating the point here made are

Terry v. Tinsley (W. Va.), 124 S. E. 290;

Edwards v. Brusha (Okla.), 90 Pac. 727;

Bolio v. Marvin (Mich.), 89 N. W. 563;

Johnson v. Elkhorn Gas Coal Mining Co. (Ky.), 197 S. W. 409;

Bradley v. Virginia Ry. & Power Co., 87 S. E. 721.

B. Restrictive Clauses in Oil Leases Are Construed as Relating to the Surface of the Land, Not to the Minerals. They Are Limitations Upon the Right to Use the Surface but Not Upon the Exclusive Right to Withdraw the Minerals.

A highly persuasive decision against Appellants is that of the United States Supreme Court in *Brown v. Spilman,* 155 U. S. 665, 39 L. Ed. 304. The facts were these:

On July 29, 1889, John F. Taylor leased to Joseph S. Brown

> "for the sole and only purpose of boring, mining and excavating for petroleum or carbon oil and gas, and piping of oil and gas over all of that certain tract of land situate in Grant township, Pleasants county, and state of West Virginia, and bounded and described as follows (description) containing forty acres more or less * * *."

Then follows the clause:

> *"excepting reserved therefrom ten acres* (describing them) upon which no wells shall be drilled without the consent of the party of the first part."

Later Taylor and wife conveyed the same tract of land to Spilman and Chancellor, subject to the lease to Brown. The Brown lease was referred to in the deed as "being a lease of *thirty acres* of said tract of land for oil and gas purposes." Subsequently Spilman and Chancellor sued Brown setting up their ownership of the tract of land containing forty acres; that Brown, without right, was asserting a claim to the oil and gas in ten acres thereof and was threatening to interfere with the right and possession of the plaintiffs in drilling oil wells and operating on said ten acres of land.

The trial court held in favor of Spilman and Chancellor, and denied Brown's cross bill for affirmative relief. On appeal to the Supreme Court this was reversed. In its opinion, the Supreme Court said:

> "Taking up the contract in the present case, we find that the grant is expressly 'for the sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas, and piping of oil and gas over all of that certain tract of land situate in Grant township, Pleasants county, and state of West Virginia, and bounded and described as follows (here follow boundaries), containing forty acres, more or less, excepting reserved therefrom ten acres beginning at the railroad (here follow boundaries) upon which no wells shall be drilled without consent of the party of the first part.'
>
> "Do these latter words import an exception of the ten acres, taking them wholly out of the grant, or a condition affecting the mode of enjoying the grant,

and, as alleged in the cross bill, 'for the personal benefit, comfort, and enjoyment of the said Taylor'?

"As the grant in terms was for the purpose of boring and mining for oil and gas, and piping of oil and gas over all of the forty-acre tract, it would be strange if an exception of ten acres was to be immediately added. If thirty acres only were to be included in the lease, and to be affected by its terms, the obvious course to pursue was to grant those thirty acres only. But if we read the grant as giving all the gas and oil under the entire tract of forty acres, and the subsequent clause as a provision that in exercising the rights granted Brown should not, without the consent of Taylor, drill wells on the ten-acre plat, we shall thus give effect to all the language used.

"There is given an express right to run pipes for gas and oil over the entire tract, and also a right of way to and from the place or places of mining. The so-called exception does not seek to reserve anything out of the grant to bore or mine for oil and gas, nor to restrict the rights of way to thirty acres. Its only purport is to forbid the drilling of wells upon the ten acres. Whilst the lease, in some sense, may be said to cover the entire tract for gas and oil purposes, yet the operation of drilling wells, with its accompanying discomforts to those living on the tract, is restricted to the thirty acres."

Compare the Temple lease with the terms of the lease construed by the Supreme Court in *Brown v. Spilman:*

Temple Lease.	Brown Lease.
Granting clause:	Granting clause:
Does hereby lease, let and demise * * * the sole and exclusive right to mine, dig, excavate, bore and drill for and otherwise develop and obtain the oil, gas, asphaltum and water, together with the right to sever, remove and take such substances from the lands situate in the County of Los Angeles (describing it) *excepting* a strip of land of a uniform width of forty feet immediately along and adjoining (description) *reserved for road purposes.*	"hath granted, demised and let * * * for the sole and only purpose of boring, mining and excavating for petroleum or carbon oil and gas and piping of oil and gas over all of that certain tract of land (describing it) containing forty acres, more or less, *excepting reserved therefrom ten acres* (describing it) upon which no wells shall be drilled without the consent of the" lessor.

In each the grant is the same, viz.: the minerals in and under the premises. The Brown lease does not in terms grant the exclusive privilege, but the court infers it. In the Temple lease it is expressly granted. In each lease the land is first described, and the reservation follows. In the Brown lease the descriptions are by reference to adjoining lands. The Temple lease describes the main tract by metes and bounds. Concerning the Brown lease the Supreme Court said:

> "The real subject of the grant was the gas and oil contained in or obtainable through the land, or rather the right to take possession of the gas and oil by mining and boring for the same."

Because of the similarity of language, the "real subject" of the Temple lease must be held to be the same.

In each lease the grant was in terms "for the purpose of boring and mining for oil and gas," etc., in the full acreage. That being so, "it would be strange if an exception" of ten acres in the one case, or a forty-foot strip in the other, "was to be immediately added." As said by the Supreme Court:

> "If thirty acres only were to be included * * * and to be affected by its terms, the obvious course * * * was to grant those thirty acres only."

If the forty-foot strip in the Temple lease was to be excluded from the effect of the lease "the obvious course" was to grant only the lessened area.

Applying the substance of the language of the *Brown v. Spilman* decision to the Temple lease, that is, "if we read the grant as giving all the gas and oil under the entire tract * * * and the subsequent clause as a provision that in exercising the right granted," wells should not be drilled in the forty-foot strip or its surface put to a use inconsistent with road purposes, "we shall thus give effect to all the language used."

In accord:

Lynch v. Burford (Pa.), 50 Atl. 228;

Indianapolis Natural Gas Co. v. Kibby (Ind.), 35 N. E. 392;

Duffield v. Hue (Pa.), 20 Atl. 526;

Westmoreland etc. Gas Co. v. De Witt, 18 Atl. 724;

Hennessy v. Junction Oil & Gas Co. (Okla.), 182 Pac. 666.

C. Where a Conveyance Contains a Detailed Description by Metes and Bounds, a Restrictive Clause, Relating to a Strip Lying in the Area Described, Will Be Construed as Withholding an Easement Rather Than the Whole Estate.

In *Pitcairn v. Harkness,* 10 Cal. App. 295 (petition for hearing in Supreme Court denied), conflicting claims were asserted to a 25-foot strip. By the deed under scrutiny one Wharton conveyed property to his wife. The deed contained this language:

> "reserving therefrom a strip of land twenty-five feet wide off the east side for street purposes."

In concluding that a mere easement was reserved the court said:

> "That the strip was included within the general description of the tract granted to the wife is clearly expressed. What was taken back out of the grant was the *reserved right to use the strip for street purposes.* * * * Had Wharton intended that the twenty-five foot strip should not be included in the conveyance to the wife, there was no necessity for continuing the northerly line so as to include this strip, for he owned the land to the east thereof. That he did continue such line so as to include the strip is significant and indicates to our mind an intention that the same should be included within the conveyance. The reasoning employed in *Abraham v. Abbott,* 8 Or. 54, wherein the facts presented were similar to those under consideration, is most convincing, and from which we are led to say that, Wharton being the owner of the land to the east of the tract conveyed to the wife, if

he did not intend to grant any interest in this twenty-five foot strip, *he will not be presumed to have included it in the deed for the mere purpose of reserving it, if any other reasonable construction can be given to the language of the instrument. Otherwise, we can see no reason why the grantor should have included this strip in the description of the land.*"

In *Abraham v. Abbott,* 8 Or. 53, after a description by metes and bounds, this language appeared:

"except a strip off of the north and west sides thereof thirty feet wide, and a strip off of the east side thereof twenty feet wide, reserved for a road."

Said the court:

"The appellant contends that the strips described in the instrument are excepted from the grant, and this is the question to be determined in the case. * * *

"The grantor in this deed being the owner of the land surrounding the tract described in the deed, *if he did not intend to grant any interest in these strips will not be presumed to have included them in the deed for the mere purpose of reserving them, if any other reasonable construction can be given to the language of the instrument.* * * * In this case we think the manifest intention of the grantor was to convey to the grantee the entire tract of land described in the deed with the reservation of the right for a road over these strips. * * * Such a construction will give effect to the grant over all the property described, and afford a reason for including these strips in the deed, otherwise we can see no reason why the grantor should have included these strips in the description of the land. * * *"

In *Elliot v. Small* (Minn.), 29 N. W. 158, the deed described an area by metes and bounds and added this clause:

> "reserving from said grant a strip thirty-three feet in width, on the south side of said tract, for a public street, and a strip thirty-three feet on the east side, which is now used and occupied as a public road and highway."

In reaching the conclusion that an easement was reserved and that the fee in the strip passed, the court said:

> "It is difficult to see why, when he had adopted the plan of describing the property by its width in chains and links, the grantor should have specified a width greater than the actual width of the premises which he intended to convey, or why he should have embraced in the specified width 33 feet more than he intended to convey *simply for the purpose of taking it out again.* The obvious and natural construction is that he meant to convey all that he described as a five-acre tract,—nine chains ninety-six links long, by five chains two links wide."

In accord, see:

Edwards v. Brusha (Okla.), 90 Pac. 727;

Bolio v. Marvin (Mich.), 89 N. W. 563.

In the instant case the measurements and boundaries given embrace the disputed strip. Under the reasoning of the above cases, it must be concluded that only an easement for a road was withheld.

POINT III.

The Nature and Provisions of the Lease Are Such as to Compel the Conclusion That Nothing More Than an Easement for Road Purposes Was Withheld by the Restrictive Clause.

A lease, like other contracts, must be considered and construed as a whole.

Simen v. Sam Aftergut Co., 26 Cal. App. 361.

Here the Court has before it an oil lease, the principal purpose of which is full and diligent development of the mineral substances underlying the surface. Such purpose becomes a factor in its construction.

See:

Acme Oil & Mining Co. v. Williams, 140 Cal. 681;
Brewster v. Lanyon Zinc Co., 140 Fed. 801;
Carder v. Blackwell Oil & Gas Co. (Okla.), 201 Pac. 252;
1 Thornton, Oil and Gas (1932), Sec. 36.

It has been shown that restrictive clauses in oil leases are construed as relating to the surface of the land, not to the minerals; that they are limitations on the right to use the surface, but not on the right to withdraw the minerals. (Point II, Subd. B, *supra.*)

Specific characteristics of the Temple lease, precluding the possibility that the minerals under the strip were intended to be withheld, are now considered:

1. The Temple lease is silent as to the location of wells. It is common knowledge, and hence a subject of judicial notice, that every producing oil well has a drainage area from which it draws the substance produced. Under the Temple and Baldwin leases, for example, the drainage area exceeds 400 feet. [R. p. 138.]

The Temple lease contemplated full development of the oil and gas. If it was the intent that the minerals under the strip should be excepted from the lease a restriction against drilling within an assumed drainage area adjacent to the strip would have been inserted. Yet there was no such restriction.

2. The strip described in the lease is but 40 feet wide. It is inconceivable that the lessor could intend to withhold the right to extract the minerals from under the narrow strip and retain such right himself.

> "As a general proposition a lessor cannot drill wells on his own lands so close to the premises he has demised as to seriously impair the value of the latter by extracting the oil and gas from them."
>
> *1 Thornton, Oil and Gas* (1932), Sec. 174.

And, as said in *Funk v. Haldeman*, 53 Pa. St. 229,

> "Is it conceivable that the parties meant that when, after much labor and large expenditures, Funk should strike oil, the grantors might sink wells on the adjoining acre, and take not only a third of Funk's product, (in royalty) but all they could pump from their own wells, though they should dry up and ruin his wells altogether?"

3. The granting clause of the Temple lease conveys:

> "The sole and exclusive right to mine, dig, excavate, bore and drill for and otherwise develop and obtain the oil, gas, asphaltum and water * * * and take such substances from the *lands* situate in the County of Los Angeles, State of California, bounded and described as follows:"

Then follows the description by *metes and bounds*. The restrictive clause is at the foot of this description.

Does the area included within the metes and bounds description constitute the *land* referred to in the granting clause? Other provisions in the same clause compel an affirmative answer:

Following the description, the "reservation," and reference to prior rights, appear the words

> "together also with the right hereby granted to enter into and upon *said premises*" and to exercise other rights and privileges "needed in carrying on said business and mining operations for *said premises.*"

The words "lands" and "premises" are used synonymously. Do they lease the land within the outer boundaries less the forty-foot strip? It is clear from the next provision of the lease that they do not. The *habendum* clause reads:

> "to have and to hold the said premises with the appurtenances * * * And the said party of the second part hereby leases from the said party of the first part the above *described* premises for the purposes aforesaid."

The outer limits are the only premises "above described." No premises are *described* within the meaning of that word if the forty-foot strip be excepted.

4. The lessor reserves the right [R. p. 89]

> "to occupy and use said *land* or to lease the same or any part thereof * * * subject to the rights of the second party herein named, *which for mining purposes shall be exclusive.*"

Until a road was laid out on the forty-foot strip this provision could be exercised. This reservation implies that no greater right was reserved or excepted.

POINT IV.

Practical Construction by the Parties, Attendant Facts and Circumstances, and Admissions by Temple, All Compel the Conclusion That Nothing More Than an Easement for Road Purposes Was Withheld by the Restrictive Clause.

A. Evidence as to These Matters Is Admissible.

1. Extrinsic evidence generally.

It has been shown that use of the words "excepting" or "reserving" is not determinative of the intent of the parties. (Point I, *supra.*)

Hence in dealing with such restrictive clauses the courts have shown a marked disposition to consider them sufficiently equivocal to permit extrinsic evidence.

In *Pritchard v. Lewis* (Wis.), 104 N. W. 989, the Wisconsin court had before it the following clause:

> "Excepting and reserving from the above-described premises a strip of land two (2) rods in width off the north side thereof, to be used as a right of way."

Concerning evidentiary matters the court said:

> "The question, therefore, arises here whether the language of the deeds in question is so ambiguous or indefinite as to admit of extrinsic evidence. * * * Immediately upon the execution of these deeds Jones swept the timber, which was valuable, from the strip, without any objection on the part of Lewis, which would be wholly inconsistent with the passing of the fee to Lewis; also the payment of taxes on this strip by Pritchard, and the fact that Mrs. Jones, one of the grantors, refused to sign deed to Lewis until Pritchard got his deed of the one acre, very

> strongly indicate that the fee to the strip was reserved, and intended to be reserved, in deed to Lewis, and transferred to Pritchard. In conveyances of this character, the question of exception or reservation being largely one of intention, and the court always determining from the nature and effect of the provision itself, the subject-matter, and the situation of the parties, *we are inclined to the opinion that sufficient ambiguity existed to warrant the admission of the testimony offered.*"
>
> *Pritchard v. Lewis* (Wis.), 104 N. W. 989.

To the same effect is *Delano v. Luedinghaus* (Wash.), 127 Pac. 197, where inquiry into "the attendant facts and surrounding circumstances" was approved.

In *Moakley v. L. A. etc. Ry.,* 139 Cal. App. 429, the court said:

> "Such clauses are to be given a reasonable construction according to the intention of the parties as ascertained from the entire instrument *together with the attendant facts and circumstances* which were before the parties at the time of making the deed."

2. Practical construction by the parties.

Where the meaning of language in a contract is doubtful the acts of the parties done under it afford one of the most reliable guides to intent. The courts will receive evidence of and follow such practical construction.

> *Work v. Associated Almond Growers,* 102 Cal. App. 232;
> *Hill v. McKay,* 94 Cal. 5;
> *Grant v. Banister,* 160 Cal. 774;
> *Slavich v. Hamilton,* 201 Cal. 299.

3. Declarations and admissions of grantor admissible.

"It may be stated generally that when one person takes an estate as successor to another, claiming under him, he takes such estate *cum onere*. The rule has often been stated that in such cases the declarations of the grantor against his title, while in possession of the premises, are always admissible, not only against him, but against those who claim under him."

2 Jones Commentaries on Evidence (1926), p. 1673, and cases cited.

See also:

2 Jones Commentaries on Evidence (1926), pp. 1670 to 1671, and cases cited;

Harp v. Harp, 136 Cal. 421;

Williams v. Harter, 121 Cal. 47.

B. Under the Evidence Adduced There Can Be No Doubt That the Parties Intended the Restrictive Language to Withhold No More Than an Easement for Road Purposes.

1. On at least two occasions, according to Kent, Temple expressed his understanding that nothing more than an easement was withheld by the restrictive language: First, when the earlier Levy lease was being discussed [R. p. 111], and, secondly, when the Temple lease was presented by Temple for execution. [R. p. 112.]

2. Again, says Kent, Temple was told of the purpose to obtain the Baldwin lease; that both leases were for Standard; and that the leases could not be taken unless the properties were adjoining. [R. p. 110.] Neither party could have intended to exclude from the lease the right to minerals under the narrow strip.

3. Inspection of the boundaries by the parties is significant. Temple pointed out the Baldwin line, and Kent was shown what would be included in the lease. [R. pp. 110-111.]

4. The physical facts indisputably demonstrate understanding and intent. Standard at all times maintained possession. [R. p. 135.] Pipe lines, pole lines and other facilities were openly placed on the strip. [R. pp. 136-137.] Although Temple visited the property frequently [R. p. 154] no objection to Standard's activities was made. [R. p. 137.]

As stated in *Coon v. Sonoma Magnesite Co.,* 182 Cal. 597, 601,

> "Until such road was constructed, the grantee would have the right to use this strip as well as the balance of the land for any suitable purpose, and thereafter for any purpose not inconsistent with the easement."

Standard did just this. And Temple evidenced no objection.

5. The treatment of taxes, evidenced by writings, speaks with compelling force. Temple exacted, and Standard paid, taxes computed with respect to the whole area included within the outer boundaries of the Temple property. [R. pp. 115, 116, 118, *et seq.*] There was no such deduction by Temple as would have resulted had the strip (2.22 acres) been excluded.

6. Finally, it will be recalled, Temple always spoke of his property (including the road strip) as "the 60-acre tract." [R. p. 144.] In his letter to Standard, November 16, 1918, relating to taxes, he specifies: *"the 60 acres you have under lease from me."* [R. p. 145.]

POINT V.

The Trial Court's Findings Are Conclusive Against Appellants.

After trial the District Court made and filed its Findings of Fact and Conclusions of Law [R. pp. 158 to 186] as required by Equity Rule 70½. All issues were, by the Findings, determined adversely to Appellants. It was specifically found that by the 40-foot strip clause the parties intended to reserve an easement for road purposes over the strip, not to except the minerals in or under it. [R. pp. 167-168.]

> "The findings below were based upon testimony taken in open court, and such findings will not be reviewed by an appellate court, except for plain or obvious error."
>
> *Gila Water Co. v. International Corporation,* C. C. A. 9, 13 Fed. (2d) 1, 2.

> "On the foregoing facts, the appellant is confronted by two well-established principles of law, from which there is little or no dissent: First, the findings of the chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact. Savage v. Shields (C. C. A.), 293 F. 863."
>
> *Easton v. Brant,* C. C. A. 9, 19 Fed. (2d) 857, at 859.

> "Upon the evidence the court below found that the rates fixed by the ordinance were not confiscatory. That finding is, upon settled principles, binding upon this court, unless it is clearly shown to be based upon

obvious error of law or upon a serious mistake or misconception of fact. We find in the record here no such ground for disturbing the finding."

Graff v. Seward, C. C. A. 9, 20 Fed. (2d) 816, at 817.

See also *Olympic etc. Co. v. Shipowners' etc. Co.,* C. C. A. 9, 48 Fed. (2d) 49, in which the rule that trial court's findings on conflicting testimony will not be disturbed except for manifest error was applied though case involved depositions as well as oral testimony.

"There is evidence in the record that both parties testified in support of their contentions. The trial court heard the evidence, observed the parties and manner of testifying, and found the policies to be effective. Upon the record we are bound by the findings of the trial court on the questions of fact."

Aetna Life Ins. Co. v. Geher, C. C. A. 9, 50 Fed. (2d) 657, at 658.

It has already been demonstrated (Point I) that whether the lease clause reserved only an easement or excepted the entire estate from effect of the lease is primarily a question of the real intention of the parties, and that such intention controls despite the technical meaning of the words "excepting" or "reserving."

The trial court specifically found that by such clause the parties to the lease intended that only an easement should by retained by Temple. Appellants do not (and cannot) contend that the evidence is insufficient to support such finding, but limit their attack to the admissibility of the evidence upon which the finding is based. However, the admissibility of such evidence has been fully demonstrated herein. (Point IV, Subd. A.) Such admissibility is, moreover, practically conceded by those arguments of

Appellants which, by reference to evidence *dehors* the lease, seek to demonstrate a contrary intent, and by several of the very authorities cited by Appellants, wherein the courts likewise resorted to such evidence in ascertaining the intent.

It follows that the findings of the court below are based upon competent evidence, the sufficiency of which is not attacked, and that such findings are hence conclusive. Such findings establish, for purposes of this appeal, that it was the intention of the parties that Temple should retain only an easement. Hence, Appellants' entire position is but an attempt to have a construction placed upon the lease diametrically opposed to the intention of the parties as so established.

POINT VI.

Appellants' Position Is Untenable.

A. Extrinsic Evidence Was Admissible.

Appellants assert that parol evidence was not admissible. (Brief, pp. 5-6.) What is obviously meant is that the court could not go beyond the lease itself to ascertain intent.

Complete response, we submit, is found under Point IV, Subd. A, above.

B. Ascertainment of the True Intent Is the Prime Objective.

Appellants assert that reservations and exceptions are interpreted in the grantor's favor. (Brief, p. 27.) But, it must be remembered,

> "Such rule must be considered in connection with other provisions of the code in reference to interpre-

tations, the most prominent of which is that all interpretations should be directed toward the ascertainment of the true intent of the parties."

Pitcairn v. Harkness, 10 Cal. App. 295, 298.

And as said by the State Supreme Court,

"the most decisive principle applying to the case is that a contract must receive such an interpretation as will make it 'lawful' and *'reasonable'."*

Adams v. Hopkins, 144 Cal. 19, 37.

C. The Unruh Requirement of Joinder in Dedication Creates No Inference Favorable to Appellants.

By the Unruh deed Temple agreed "to join with said grantor * * * in dedicating to and for public highway purposes said strip of land." [R. p. 32.]

Appellants contend that "Temple would have been unable to comply therewith if he had leased the fee thereto to Kent." (Brief, p. 8.)

It is of course elementary that the fee does not pass under a lease. Standard never acquired the fee. But aside from this, Appellants ignore the law of dedication:

It is wholly unnecessary to a dedication that the title in property be conveyed. The public takes nothing but an easement. *City of Burlingame v. Norberg,* 210 Cal. 105; 9 Cal. Jur. 75, and cases cited. An easement for road purposes over the 40-foot strip was reserved. Nothing further was necessary.

D. Comparison of Language Does Not Assist Appellants.

In conceding that the Unruh deed withheld merely an easement, Appellants must seek a distinction to contend that the Temple lease did otherwise.

The Unruh deed says: "Excepting and reserving * * * for road purposes * * *." [R. p. 32.] The Temple lease says: "Excepting * * * reserved for road purposes." [R. p. 36.] Appellants say the word "reserved" is past tense, and means "reserved to Unruh by the prior instrument." (Brief, p. 9.)

But no reference to Unruh or his deed appears in the Temple lease. The word "reserved" is used as a participle, not as a verb. It is hence more plausible to conclude that the language means "hereby reserved" than that it means "heretofore reserved to Unruh."

Appellants also point to the later clause of the lease reserving the right "to occupy and use said land or to lease the same * * * for agricultural or grazing purposes." [R. p. 37; Brief, p. 10.] This right, however, is expressly "subject to the rights of the second party herein named, *which, for mining purposes shall be exclusive.*" [R. p. 37.] This is a customary provision. It is common knowledge, and hence a subject of judicial notice, that almost all oil leases contain it. Its significance weighs in favor of Appellee, not Appellants.

Appellants also point to the clause (following the 40-foot strip clause) relating to the South Easterly Two (2)

acres.* [R. p. 37.] Here again, the significance is contrary to that asserted:

(a) The clause commences "EXCEPTING THEREFROM the most South Easterly Two (2) acres of said Tract * * *." The word "therefrom" is not present in the 40-foot strip clause. Its presence in the two-acre clause must evidence an intent not shown by the 40-foot strip clause.

(b) Again, in the two-acre clause, no showing of purpose is included, as "for road purposes." This is a vital distinction.

(c) Again, with respect to the two acres, special and detailed provisions are inserted in the lease to make it clear that no drilling or similar operations shall be conducted there. [R. p. 42.] Clearly, the parties must have thought such elaborate statement necessary to show their intent respecting the two acres. If similar intent were present as to the 40-foot strip, similar provision as to it would have been made.

E. THE PRIOR RESERVATION TO UNRUH WAS WHOLLY CONSISTENT WITH RETENTION OF THE EASEMENT IN THE TEMPLE LEASE.

Appellants argue (Brief, p. 12) that since the easement was reserved to Unruh by the Unruh deed, Temple could not "reserve" it because it belonged to someone else; that if a new (easement) right could not be created in Temple by the lease clause, then the clause must be construed as "excepting" or withholding complete ownership in and under the strip.

---

*It may be noted that in November, 1917, these two acres were by supplemental agreement included in the lease. [R. p. 147.]

This misconception is based upon confusion as to technical terms. What Temple obviously intended by the strip clause was to withhold the easement from the lease to protect himself on his implied covenant of quiet enjoyment.

> "An exception or reservation of an existing highway passing through the granted land is usually for the purpose of relieving the grantor from his covenant against incumbrances, and the fee in the land so excepted passes to the grantee."
>
> *4 Thompson on Real Property* (1924), p. 410, Sec. 3293.

See also:

Capron v. Kingman (N. H.), 14 Atl. 868;

Day v. Philbrook (Me.), 26 Atl. 999.

The statement (quoted by Appellants, Brief, p. 12) is made that if the intent is "not to reserve a new right * * * but to recognize and except * * * an existing right * * * it is an exception."

But, query: An exception of what? Clearly, the *existing right:* in this case an *easement.*

Easements may be created or retained by "exception" as well as by "reservation."

Bridger v. Pierson, 45 N. Y. 601;

Claflin v. Boston & A. R. Co. (Mass.), 32 N. E. 659;

Hagarty v. Lee, 54 N. J. L. 580;

Ring v. Walker (Me.), 33 Atl. 174.

"A reservation or exception of all roads built over the premises is not an exception of the soil of the roads, but merely of the easement of the public in such roads."

4 Thompson on Real Property (1924), p. 369, Sec. 3258.

Thus, even though the 40-foot strip clause be viewed as "excepting" an existing right, that right was an easement. Nothing greater was withheld.

See:

Wood v. Boyd (Mass.), 13 N. E. 476.

F. Appellants' Point Concerning Reservation to Stranger Answered.

Appellants urge (Brief, p. 13) that a reservation to a stranger is void; and that if the lease clause be regarded as a "reservation" it could only be to Unruh, a stranger, and hence would be void. On the other hand, say Appellants, the clause while void as a reservation may nevertheless be valid as an "exception." Hence, it is argued by implication, the parties must have intended a valid act and therefore must have intended an "exception."

This argument, like others predicated by Appellants upon reference to the Unruh deed, defeats Appellants' fundamental thesis, i. e., that the trial court in determining the intention of the parties to the lease was confined to the language thereof and that it was not permitted to determine such intention by reference to the surrounding facts and circumstances. Nowhere in the lease is Unruh, his deed, or its effect in any way mentioned; hence, Appellants, by reference to the Unruh deed, concede the prime

importance of intention, and that resort to the collateral circumstances is material to ascertainment thereof. Based upon such and sufficient evidence, the trial court made comprehensive findings of intention fatal to Appellants' position. As demonstrated in Point V, such findings are here conclusive.

In addition it is apparent that Appellants are here guilty of a palpable *non sequitur* in assuming that the language of the lease must be construed not only as an exception, but as an exception of *all estate* in the strip, instead of an *easement* only. Assuming, for argument, that the clause does purport to "reserve" the easement to Unruh, a stranger, and that under such circumstances it should be construed as an "exception" in order to have effect—even then the clause would not withhold all estate in the strip as Appellants seem to assume. On the contrary, it would withhold only the *thing* or *right* sought to be reserved: in this case *an easement.*

This is made clear by *Wood v. Boyd* (Mass.), 13 N. E. 476. The grantor there had previously conveyed easements to third persons. In his later deed to plaintiff the easements were "reserved." Said the court:

> "The plain purpose of the parties was not to reserve any new right which should vest in the grantor, but to recognize, and except from the grant, rights of way existing, by prior grants, in third persons who were not parties to the deed. * * * Construing the clause in the plaintiff's deed as an exception, it *qualifies and limits* the estate granted. 'The granted premises,' which are covenanted to be free from in-

> cumbrances, is *not the land in fee,* but the *fee diminished by existing easements,* which are excepted out of the grant. Such *easements* are not incumbrances upon 'the granted premises.' They are excepted as they existed—that is, *as perpetual easements,* * * *."
>
> *Wood v. Boyd* (Mass.), 13 N. E. 476.

The principle that the "exception" embraces only the interest, right or thing sought to be "reserved" is also illustrated in *Boyer v. Murphy,* 202 Cal. 23. There a life estate was involved.

The late case of *Moakley v. L. A. Pac. Ry.,* 139 Cal. App. 421, likewise repudiates Appellants' suggestion that the whole estate is retained. There the grantor had previously conveyed an easement to the electric railway, a third party. His later grant to Turner recited "excepting therefrom so much as has been taken * * * for electric car lines across said land." Held: The fee passed; only the easement was withheld. "Reasonable construction according to the intention of the parties" was the criterion.

G. Appellants' Authorities Distinguished.

Moakley v. Blog, 90 Cal. App. 96. (Brief, p. 14.) This case, like the other (later) *Moakley* case, *supra,* repudiates Appellants' position. The Willmon-Stimson deed under scrutiny, conveyed the described property "except right of way of the Los Angeles Railway Co. over a strip thirty-five feet wide * * *." The right of way had earlier been granted (a fee upon condition subsequent for reversion) to the Railway Company, a third party. Held: Willmon did not withhold the fee (reversion) of the strip from Stimson by the language quoted; it passed to Stimson.

The case thus being adverse, Appellants cite it for its *dictum,* i. e., the suggestion that the words "strip of land" are a criterion by which to determine whether a restrictive clause withholds all estate or merely an easement. This *dictum* is wholly without persuasive force in view of the cases reaching the contrary result:

Coon v. Sonoma Magnesite Co., 182 Cal. 597;

Pitcairn v. Harkness, 10 Cal. App. 295;

Edwards v. Brusha (Okla.), 90 Pac. 727;

Terry v. Tinsley (W. Va.), 124 S. E. 290.

See, also:

Bradley v. Virginia Ry. & Power Co. (Va.), 87 S. E. 721;

Abraham v. Abbott, 8 Or. 53;

Elliot v. Small (Minn.), 29 N. W. 158.

> "The only language in the clause under consideration which indicates that the intent of the parties was to reserve the *fee* is the provision for the 'exception' of a strip of *'land.'* The fact that this is a strip forty feet wide which meanders a stream and is to be used for a road is, however, an indication that the parties contemplated an easement rather than an exception. * * * The phrase 'for a road' *Modified the whole clause."*
>
> *Coon v. Sonoma Magnesite Co.,* 182 Cal. 597.

Delano v. Luedinghaus (Wash.), 127 Pac. 197. (Brief, p. 18.) The result reached in this case is dictated by consideration of "attendant facts and surrounding circumstances before the parties," and by the precept that "in each case the equities of all the parties must be considered

in arriving at the intent of the deed." The court dwells upon the hardship defendant would suffer if its ruling were adverse. Obviously this controls the decision.

The case thus affirmatively shows (contrary to what appellants elsewhere in their brief contend) that the Court may properly consider evidence in addition to the instrument itself in arriving at the true intent.

In the instant case there are no equities favoring Appellants.

Munn v. Worrall, 53 N. Y. 44. (Brief, p. 20.) The restrictive language in this case differs widely from that of the Temple lease. It commences "saving and excepting *from the premises hereby conveyed* * * *." The court stresses the italicized words. But even aside from this difference, the case cannot properly militate against the authority and reasoning of *Coon v. Sonoma Magnesite Co., supra.*

Wood v. Boyd (Mass.), 13 N. E. 476. (Brief, p. 20.) This case is cited for the point that "reservations" of "existing rights" or to "strangers" result in "exceptions." As shown under Subd. "F," *supra* (this Point VI), where the case is quoted, it denies Appellants' suggestion that such "exception" withholds the fee. On the contrary it establishes that only the right or interest sought to be "reserved" is withheld, i. e., an easement. Aside from this, the "reservation" in the *Wood* case was expressly to third persons; such is not the case here.

Howe v. Sadler, 15 Ky. L. 765, 25 S. W. 277. (Brief, p. 22.) Here, after a conveyance, Ballard to Morrison, "excluding from the above named boundary" a certain lease, the grantor remained in possession of the premises,

cut timber and exercised other rights of ownership. This, as stated by the court, was "a right clearly inconsistent with the claim of the appellant that Morrison got the fee in the deed mentioned."

Thus it is again affirmatively demonstrated (contrary to what Appellants elsewhere in their brief contend) that the court may in such cases consider evidence in addition to the instrument in arriving at the true intent.

Of course the words *"excluded from"* are not used in the Temple lease clause, nor did Temple, after leasing, retain possession or exercise rights inconsistent with the inclusion of the strip in the lease.

Reynolds v. Gaertner (Mich.), 76 N. W. 3. (Brief, p. 22.) Here a deed conveyed to defendant certain land "except two and forty-six hundredths acres to the Chicago and Canadian Southern R. R." Besides being different, the language contained no showing of purpose, as "for a road," nor were there other elements, as in our case, unmistakably pointing to retention of an easement.

Hall v. Wabash (Ind.), 110 N. W. 1039. (Brief, p. 23.) Here the restrictive language was "excepting *the part occupied by* the right of way * * *." It is conceded that this may mean more than "excepting the right of way." In assuming, however, that an exception of the right of way alone "would mean nothing" the case is wholly at war with *Moakley v. L. A. Pacific Ry.,* 139 Cal. App. 421, and other cases of like import.

Pritchard v. Lewis (Wis.), 104 N. W. 989. (Brief, p. 25.) In this case the court expressly sanctioned the admission of extrinsic evidence. Such evidence showed a practical construction by the parties, removal of timber,

treatment of taxes, and another deed of the same land, all wholly inconsistent with an intent to pass the fee. In our case the converse condition exists; all factors point to the evident intent to retain only the easement.

The case is significant in that it affirmatively shows (contrary to what Appellants elsewhere in their brief contend) that the court may properly receive and consider evidence in addition to the instrument in arriving at the true intent.

Spilman v. Brown, 45 Fed. 291. (Brief, p. 25.) This is the only oil lease case cited by Appellants. It concludes that the words of the lease "excepting reserved therefrom 10 acres" withheld all estate therein. However, on appeal to the United States Supreme Court (*Brown v. Spilman,* 155 U. S. 665, 35 L. Ed. 304), this holding was wholly rejected and reversed. The Supreme Court's decision, announcing the true doctrine, is above discussed. (Point II, Subd. B, *supra.*)

CONCLUSION.

The decree of the District Court should be affirmed.

Respectfully submitted,

LAWLER & DEGNAN,
MAX FELIX,
BRENTON L. METZLER,
Attorneys for Appellee.

No.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

NORA L. POWERS and GEORGIANNA R. JUDD,
Complainants,

vs.

LAKE VIEW OIL AND REFINING COMPANY, a corporation,
Defendant.

STATE OF CALIFORNIA,
Appellant and Cross-Appellee,

vs.

PAUL J. HISEY, as Receiver of Lake View Oil and Refining Company, a corporation,
Appellee and Cross-Appellant.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Solicitors.

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BRADNER & WEIL, Esqs.,

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JEROLD E. WEIL, Esq.,

Security Building,
Los Angeles, California.

United States of America, ss.

To PAUL J. HISEY, as Receiver of Lake View Oil & Refining Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 18 day of December, A. D. 1935, pursuant to an order allowing the State of California an appeal, of record in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled Nora L. Powers and Georgianna R. Judd, Complainants, vs Lake View Oil and Refining Company, a corporation, Defendant, wherein the State of California is appellant and you are appellee to show cause, if any there be, why the portion of the order appealed from by said State, as in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Wm P James United States District Judge for the Southern District of California, this 19 day of Nov., A. D. 1935, and of the Independence of the United States, the one hundred and sixtieth.

Wm P James
U. S. District Judge for the Southern District of California.

[Endorsed]: Filed, Nov. 19, 1935. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AFFIDAVIT OF SERVICE OF CITATION

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

JOHN ALLEY, being first duly sworn, says: I am and was on the date herein mentioned over the age of eighteen years and not a party to this action; I served the attached Citation in this action by personally delivering to and leaving with the following person at the county of Los Angeles, on the date set opposite their respective names, a true copy thereof, to-wit:

Paul J. Hisey, as receiver of Lake View Oil & Refining Company, a corporation, by serving B. J. BRADNER, his attorney.....November 20, 1935.

John Alley

Subscribed and sworn to before me this 26th day of November, 1935.

[Seal] Kathryn Burkman.
Notary Public in and for said County and State.

[Endorsed]: Filed Nov 26 1935 R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

United States of America, ss.

To State of California Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 24 day of December, A. D. 1935, pursuant to an order allowing Paul J. Hisey, Receiver, an appeal, of record in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled Nora L. Powers and Georgianna R. Judd, Complainants, vs Lake View Oil and Refining Company, a corporation, Defendant, wherein the said Paul J. Hisey, Receiver is appellant and you are appellee to show cause, if any there be, why the portion of the order appealed from by said Paul J. Hisey, Receiver as in the said appeal mentioned, should not be corrrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Wm. P. James United States District Judge for the Southern District of California, this 25 day of November, A. D. 1935, and of the Independence of the United States, the one hundred and sixtieth

Wm. P. James
U. S. District Judge for the Southern District of California.

Received copy of the foregoing citation this 25 day of November, 1935.

U. S. WEBB, ATTORNEY GENERAL,
By John O Palstine, Deputy
Attorneys for the State of California

[Endorsed]: Filed Nov., 26, 1935 R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

NORA L. POWERS and GEORGIANNA R. JUDD,	)	
Complainant,	)	IN EQUITY NO. T-121-J
vs.	)	
LAKE VIEW OIL AND REFINING COMPANY, a corporation,	)	PROOF OF PREFERRED CLAIM
Defendant.	)	

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES.)

On the 27 day of May, A. D., 1931, came Ray L. Riley and made oath and said:

1. That he is the duly elected, qualified and acting Controller of the State of California, and as such is duly authorized to make this claim on behalf of said claimant.

2. That Lake View Oil and Refining Company, a corporation, defendant in the above entitled proceeding, was on the 8th day of May, 1931, and at the time of the appointment of the Receiver herein, and still is justly and truly indebted to the said claimant in the sum of $37,557.28.

3. That the consideration of said debt is as follows:

Motor Vehicle Fuel taxes duly levied and assessed as provided by law (Chapter 267, Statutes of Calif. 1923, as amended) as follows:

For the quarter of the year ending March 31, 1931	$34,142.99
Penalty of 10% for non-payment when due.....	3,414.29
Total balance due for said quarter.....	$37,557.28

4. That no part of said debt has been paid, except as above stated; that no promissory note has been issued by said Lake View Oil and Refining Company, a corporation, for said indebtedness, nor for any part thereof, nor has any judgment been rendered thereon; that there are no offsets or counter claims to the same; and that said claimant has not, nor has any person by its order or to the knowledge or belief of the undersigned, had or received any manner of security for said debt whatever, except;

That by the provisions of said act above mentioned said tax constitutes a lien upon all the property of said defendant which lien attached as of the date of the delivery or distribution of said Motor Vehicle Fuel, and said tax has the effect of an execution duly levied against all property of said defendant and remains until the tax is paid or the property of said defendant is sold for the payment thereof.

5. That said claim, being a claim for taxes due and unpaid to the State of California, constitutes a prior claim against the estate of said defendant, and complainant herein prays that the same be allowed as such prior claim.

RAY L. RILEY
Controller, State of California,
P. O. ADdress, Sacramento, California.

U. S. WEBB
Attorney General, State of California,

H. H. LINNEY
Deputy Attorney General,
640 State Building,
San Francisco, California.

Attorneys for Complainant.

Subscribed and sworn to before me this 27 day of May, 1931.

JOHN W. MALTMAN
Notary Public in and for the County of Los Angeles, State of California

My commission expires May 1o. 1935

SEAL

STIPULATION.

IT IS HEREBY STIPULATED that the foregoing, a true copy of the corrected claim filed with the Receiver in the above proceeding, may be filed in the above entitled Court in lieu of said original, and made a part of the record on any appeal relating to said claim.

Dated: November 14th 1935.

U. S. WEBB, Attorney General,

By: John O. Palstine
Deputy Attorney General
Attorneys for Complainant.

BRADNER & WEIL,

By: B. J. Bradner
Attorneys for Paul J. Hisey, Receiver.

[Endorsed]: Filed Nov. 19, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR ORDER TO SHOW CAUSE WHY CLAIM FOR TAXES SHOULD NOT BE ALLOWED AS A PREFERRED CLAIM.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The petition of the People of the State of California, by and through the Attorney General of said State, claimant in the above entitled action, respectfully represent:

I.

That the above named respondent is indebted to the State of California in the sum of Thirty-seven Thousand Five Hundred Fifty-seven and 28/100 ($37,557.28) Dollars for taxes assessed against said respondent by said State on account of gasoline sold by respondent as a distributor in said State of California. That said State, by and through the Controller thereof, heretofore duly filed with the receiver herein, its claim against said respondent for said taxes; that the laws of said State provide that such tax shall be a lien upon all property of the distributor attaching at the time of delivery or distribution subject to said license tax, having the effect of an execution duly levied against all property of the distributor, and remaining until the license tax is paid or the property sold in

payment thereof; that said claim was filed as a preferrred claim and as being a lien on the property of the respondent, all as set forth in said claim so filed with the receiver herein.

II.

That said receiver, through his counsel has refused to allow said claim as a preferred or lien claim, or at all, notwithstanding the provisions of law making the same a preferred claim and creating a lien therefor.

WHEREFORE, your petitioner prays that this court order said receiver to show cause, if any he has, in this court, at an hour and on a date to be appointed by the court, why he should not allow said claim as a preferred claim and as a lien claim prior to the claims of other creditors of the respondent, and why he should not distribute to the State of California on account of said claim any cash now in his hands and available for distribution, and for such other and further orders as to the court may seem just and proper in the premises.

U. S. WEBB, Attorney General,

By: John O. Palstine
Deputy Attorney General

Attorneys for and on behalf of the People of the State of California.

[Endorsed]: Filed Jul. 31, 1935. R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

ORDER TO SHOW CAUSE WHY PREFERRED CLAIM OF STATE OF CALIFORNIA FOR TAXES SHOULD NOT BE ALLOWED AND DISTRIBUTION MADE TO SAID STATE.

Upon reading and filing the petition of the State of California for an order that the receiver in the above entitled action show cause before this Court why he should not allow a certain claim for taxes filed by said State as a preferred and lien claim, and why he should not distribute to said State on account of said claim any moneys in his hands available for distribution and for general relief, and good cause appearing therefor,

IT IS ORDERED that Paul J. Hisey, receiver in the above entitled action show cause, if any he has, before this Court at 10 o'clock, A. M. on the 3rd day of September 1935, or as soon thereafter as the matter can be heard by the Court, in the courtroom of the Honorable Wm. P. James, United States District Judge, in the Federal Building, Los Angeles, California, why the claim of the State of California for taxes heretofore filed with the said Paul J. Hisey, receiver, should not be allowed as a preferred claim and as a lien against the assets of the above named respondent, to be paid prior to claims of other creditors of the said respondent, and to then and there show cause, if any he has, why he should not distribute to said State of California on account of said

claim the moneys now in his hands and available for distribution.

IT IS FURTHER ORDERED that the petitioner, the People of the State of California, shall give 10 days notice of this order to show cause to the said receiver by service of a copy of the petition upon which this order is made and a copy of this order on the said receiver, or his counsel of record herein.

Dated: July 30 1935.

Wm. P. James
United States District Judge

[Endorsed]: Filed Jul. 31, 1935 R. S. Zimmerman, Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER TO PETITION OF STATE OF CALIFORNIA FOR ORDER TO SHOW CAUSE WHY CLAIM FOR TAXES SHOULD NOT BE ALLOWED AS A PREFERRED CLAIM.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

Now comes PAUL J. HISEY, receiver herein and for answer to the Petition of the State of California for Order to Show Cause Why Claim for Taxes Should Not Be Allowed as a Preferred Claim, and for answer and response to said Order to Show Cause respectfully represents and shows:

–I–

Answering paragraph I of said Petition, this receiver denies that said LAKE VIEW OIL AND REFINING COMPANY, a corporation, or this receiver or said receivership estate is indebted to the State of California in the sum of Thirty-seven Thousand Five Hundred Fifty-seven and 28/100 ($37,557.28) Dollars for taxes assessed by said State on account of gasoline sold by said LAKE VIEW OIL AND REFINING COMPANY, a corporation, or this receiver or said receivership estate as a distributor in the State of California, or in any other sum whatever or is indebted to the State of California in any other sum whatever, or otherwise, or at all. Admits that said State, by and through the Controller thereof, filed with the receiver herein a claim for taxes; that

said claim was filed on or about the 27th day of May, 1931; that said claim was for taxes claimed for the quarter of the year ending March 31, 1931, in the sum of Thirty-four Thousand One Hundred Forty-two and 99/100 ($34,142.99) Dollars, and for a penalty for non-payment of ten per cent (10%), amounting to the sum of Three Thousand Four Hundred Fourteen and 29/100 ($3414.29) Dollars, or the total of Thirty-seven Thousand Five Hundred Fifty-seven and 28/100 ($37,557.28) Dollars; admits that certain statutory provisions of the State of California purport to provide that such a tax (but not the penalty) shall be a lien upon all property of the distributor, attaching at the time of delivery or distribution, subject to said license tax, having the effect of an execution duly levied against all property of the distributor and remaining until the license tax is paid or the property sold in payment thereof, but denies that under the laws of the State of California or of the United States there is a lien upon any property of such distributor for such tax either having the effect of an execution duly levied, or otherwise, or at all, for the reasons hereinafter more particularly set forth; admits that said claim was filed as a preferred claim as set forth in said claim, but not otherwise.

–II–

Answering paragraph II of said Petition, this receiver admits that he has refused to allow said claim as a preferred, or a lien claim, or at all, but denies that such refusal to allow was contrary to any valid provisions of law making said claim a preferred claim and/or creating a lien therefor, but, on the contrary, alleges that said receiver refused to allow said claim as a preferred, or a lien claim, or at all, for the reasons which are set out hereinafter.

–III–

That as to said penalty of $3,414.29, the provisions of the statute of the State of California involved herein and hereinafter referred to, by its terms provided that the license tax becoming due during any quarter shall be paid within thirty-five (35) days after the end of the quarter, and if not paid prior thereto shall become delinquent on the forty-fifth (45th) day after the end of such quarter, and a ten per cent (10%) penalty shall be added thereto for delinquency; that the said claim of the State of California was for a license tax claimed to be due for the quarter ending March 31, 1931; that by the terms of said statute said license tax would not become delinquent or said 10% penalty attach until the forty-fifth day after March 31, 1931, or to-wit: until May 15, 1931; that said Paul J. Hisey was appointed and qualified as receiver herein on May 8, 1931, and prior to the time when said claimed license tax had become delinquent under the terms of the said statute, and prior to the time when any penalty had accrued under the provisions of said statute; that your receiver filed a petition with the above entitled Court in or about the month of August, 1931, asking for the approval of various claims against said receivership estate, but not asking for any approval of the said claim of the State of California; that by said petition your receiver did ask for the disapproval of said claim of the State of California, so far as said penalty of $3,414.29 was concerned; that thereafter and on or about the 29th day of August, 1931, an Order and Decree was entered in the above entitled Court, approving various claims filed against said receivership estate, but not approving the claim of the State of California, and disallowing the claim of the State of California, insofar as the $3,414.29 was

concerned; that the State of California has taken no steps, until the filing of the present Petition, to contest said Order and Decree.

–IV–

That the statute which is the sole basis for the claim of the State of California is that certain statute of the State of California approved May 30, 1923, Statutes 1923, Page 571, as amended by Statutes 1925, Page 659, et seq., and as further amended by Statutes 1927, Page 1309, et seq., and the further statute approved May 26, 1927, Statutes 1927, Page 1565. That the only purpose of said last mentioned statute, so far as material here, was to add one cent (.01) per gallon tax to the two cents (.02) per gallon tax provided for by said first mentioned statute; that for the convenience of the Court, a copy of all the pertinent clauses of said first mentioned Statute are hereto attached with the pertinent amendments of 1925 and 1927; that said statute and amendments are printed in "Deering's General Laws of California, 1923", and "Deering's Consolidated Supplement of Codes and General Laws, 1925-1927", under title "220" therein, entitled "Gasoline", also designated as "Act 2964."

–V–

That as will appear from the provisions of the said statute as amended, said statute purports to provide that said tax shall be a lien upon all the property of the distributor, attaching at the time of delivery or distribution, subject to the tax, and having the effect of an execution duly levied against all property of the distributor, but nowhere in said statute as amended is there any provision for the enforcement of said lien, nor is there in said Act

any provision whatever for a notice or hearing with respect to said lien or the enforcement thereof, or the seizure, or sale of any property by reason of said lien or to enforce the same; that under the laws of the State of California the enforcement of tax liens and the collection of taxes must be in strict conformity with the statutory provisions, and such remedies exist only as provided by statute; that under the Constitution of the United States property cannot be taken, except by due process of law upon proper notice and with right of hearing; that by reason of the foregoing, the attempt of the Legislature of the State of California, by said statute as amended, to impose a lien for said tax was nugatory and of no force or effect whatever and the property coming into the hands of your receiver on May 8, 1931 was not subject to any lien for said tax, and if said claim of the State of California is valid at all it is valid only as a general claim without right of preference.

–VI–

That the decision of the United States Circuit Court of Appeals for the Ninth Circuit in Case No. 7383, decided December 21, 1934, entitled E. L. Pauley, as Receiver, etcetera, Appellant vs. the State of California, Appellee, is not determinative of the question as to the tax claim herein involved, for the reason that the tax under consideration in said case was a tax governed by the 1931 Amendments of said statute, by which said statute was extensively amended, providing, among other things, for a method of enforcement of said lien upon notice, and further, as pointed out in said decision of the United States Circuit Court of Appeals, providing for "Collection of Tax if Delinquent", "Seizure of Property", "Notice

of Intended Sale", "Sale in Accordance with Law", "Forfeiture of Bond or of Deposit", "Proceedings if Tax Not Paid", and provisions for citation of the distributor before the State Board of Equalization, etcetera. That in and by said decision it was held that by reason of said provisions of the statute of 1931, said statute was not in contravention of the due process provisions of the United States Constitution. Your respondent submits that therefore, since none of said provisions are contained in the statute as it existed prior to said amendments of 1931, said statute is unconstitutional as being in contravention of the 14th Amendment of the United States

WHEREFORE, your respondent, as receiver herein, prays that the State of California take nothing by this Petition; that the claim of the State of California be disallowed, both as to the tax claimed and the penalty, and that the previous Order and Decree of this Court disallowing the penalty to be confirmed, and for such other and further orders as to the Court may seem just and proper in the premises.

PAUL J. HISEY, Receiver for
LAKE VIEW OIL AND REFINING COMPANY

By Paul J. Hisey
Paul J. Hisey, Receiver

BRADNER & WEIL

By: B. J. Bradner
B. J. BRADNER

Attorneys for
Paul J. Hisey, Receiver

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

PAUL J. HISEY, being by me first duly sworn, deposes and says:

That he is the Receiver in the above entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Paul J. Hisey
PAUL J. HISEY

Subscribed and sworn to before me this 12th day of September, 1935.

[Seal] B. J. Bradner
Notary Public in and for said County and State.

TITLE 220.
GASOLINE

The amendments of 1925 and 1927 are as follows:

Sec. 4. Tax, when due and when delinquent. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty four and each year thereafter. Said tax shall be a lien upon all the property of

the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock P. M. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency. (Amendment approved May 23, 1925; Stats. 1925, p. 659.)

Sec. 12. Examinations by board of equalization. The state board of equalization shall have the power and it is hereby authorized to make any and all such examinations of the records of distributors as it may deem necessary in carrying out the provisions of this act. If such examinations made by said board shall disclose that any reports of distributors of motor vehicle fuel theretofore filed with said board by said distributors, pursuant to the requirements of this act, have shown incorrectly the amount of gallonage of motor vehicle fuel distributed or the tax accruing thereon, said board shall have the power and is hereby authorized to make such changes in subsequent assessments of said distributors under this act as it may deem necessary to correct the errors disclosed by its examination of the records of said distributors as hereinbefore authorized. The cost if any of such examination to be payable from the regular appropriation for clerical

assistance of said board. (Amendment approved May 23, 1927; Stats. 1927, p. 1310.)

Sec. 14. Penalties. Any person, firm, association or corporation or any officer or agent thereof failing to pay the tax as herein provided or violating any of the other provisions of this act, or unlawfully making any false statement, or concealing any material fact in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor, unless such act is by any other law of this state declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

The state board of equalization shall have power to revoke the license of any distributor refusing or neglecting to comply with the provisions of this act. (Amendment approved May 23, 1925; Stats. 1925, p. 661.)

The body of the act of 1925 amended section 14, but there was no mention of it in the title of the act.

Sec. 18. Procedure. All matters of procedure relating to refunds of taxes or the cancellation of any assessment levied under the provisions of this act shall be governed by the provisions of section three thousand six hundred sixty-nine of the Political Code. (New section added May 23, 1925; Stats. 1925, p. 661.)

(Codes and General Laws—California, by Deering. 1925-1927. pgs. 1221, 1222, 1223 and 1224.)

TITLE 220.
GASOLINE

(Approved May 30, 1923, Stats. 1923, p. 571.)

Section 3. LICENSE TAX TO BE PAID BY DISTRIBUTOR. Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock on hand or held in storage by him on September 30, 1923. From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling.

Section. 4. TAX, WHEN DUE AND WHEN TO BE PAID. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand

nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. The amount of such license tax becoming due during each such quarter shall be paid within forty days after the end of the quarter for which the same is due.

Section 5. RECORD TO BE KEPT BY DISTRIBUTOR. Every distributor shall keep a record in such form as the state board of equalization shall require, showing the total number of gallons of motor vehicle fuel refined, manufactured, produced or compounded in this state and sold by such distributor within this state during each quarter; showing the total number of gallons of motor vehicle fuel imported into this state by such distributor and sold or distributed by such distributor in this state during each quarter, whether in the original package or container in which the same was imported or otherwise than in such original package or container and the total number of gallons of such fuel acquired by such distributor in the original packages or containers in which the same was imported into this state and thereafter sold, distributed or used by him.

Section 6. STATEMENTS TO BE FILED BY DISTRIBUTOR. TAX TO BE COMPUTED THEREFROM. Each distributor shall, within twenty days after the quarter ending December thirty-first, one thousand nine hundred twenty-three, and within twenty days after the end of each following quarter, file on forms to be prescribed, prepared and furnished by the state board of equalization, a verified statement showing the total number of gallons of motor vehicle fuel refined, manufac-

tured or compounded by such distributor within this state and sold during such quarter by such distributor within this state; the total number of gallons of motor vehicle fuel imported into this state by such distributor and sold or distributed within this state by such distributor during such quarter, when sold or distributed otherwise than in the original packages or containers in which imported into this state or used by such importer; also the number of gallons of such fuel acquired by him in the original package or container in which the same was imported into this state and thereafter sold, distributed or used by him; and such other information as the state board of equalization may require. The state board of equalization shall compute the license tax due or to become due hereunder, and extend the same upon a tax-roll prepared and kept for the purpose, and on or before thirty days from and after the close of each quarterly period as herein defined, shall deliver said tax roll to the state controller, who shall give due notice of the dates when said taxes will become due.

Section 8. PENALTIES REGARDING STATEMENTS. It shall be unlawful for any distributor to fail, neglect or refuse to make and file any statement required by this act in the manner or within the time therein provided, or to make any such statement false in any particular.

Section 9. FIXING TAX WHERE NO RETURN IS MADE. DUTY OF ATTORNEY GENERAL. If any distributor shall fail, neglect or refuse to file the reports herein provided, the state board of equalization, immediately after such time has expired, shall proceed to inform itself as best it may regarding the matters and

things required to be set forth in such statement, and, from such information as it is able to obtain, shall make a statement showing such matters and things and shall determine and fix the amount of the license tax due to the state from such distributor for such quarter, and shall add to the amount of such license tax a penalty of twenty-five per cent thereof, and shall deliver such statement to the state controller who shall proceed to collect the amount of such license tax with the penalty added thereto, together with interest on the whole thereof at the rate of seven per cent per annum from the date upon which such statement should have been filed, and the distributor is thereafter estopped from complaining of the amount thereof.

Upon the request of the state controller, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued.

Section 14. PENALTIES. Any person, firm, association or corporation or any officer or agent thereof violating any of the provisions of this act, or unlawfully making any false statement, or concealing any material fact in any record, report, affidavit or claim provided for herein, shall be guilty of a misdemeanor, unless such act is by any other law of this state declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand

dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

The state board of equalization shall have power to revoke the license of any distributor refusing or neglecting to comply with the provisions of this act.

Section 15. CONSTITUTIONALITY. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Section 16. REPEALED. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Section 17. IN EFFECT WHEN. This act shall go into effect upon the thirtieth day of September, one thousand nine hundred twenty-three, provided there shall have been theretofore enacted that certain act to be known and cited as the "California vehicle act" introduced in the forty-fifth session of the legislature as Senate Bill No. 743.

(General Laws of California, 1923, Part One pages 1104, 1105, 1106, 1107, and 1110.)

[Endorsed]: Filed Sep. 13, 1935 R. S. Zimmerman Clerk By Robert P. Simpson Deputy Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

NORA L. POWERS and GEORGIANNA R. JUDD,	)	
Complainants,	)	No. T-121-Eq.
vs.	)	OPINION AND ORDER.
LAKE VIEW OIL AND REFINING COMPANY, a corporation,	)	
Defendant.	)	

The State of California petitions for an order determining that it has the right to preferential payment against all claimants for an amount of $37,557.28, claimed to be due as a tax on the business now being operated by the Receiver of producing, refining and distributing gasoline and kindred products. The amount of $34,142.99 represents the principal of the tax, the added $3,414.29 being as for penalty for non-payment, as provided by the State statute. The license tax is claimed to have accrued for the quarter ending March 31, 1931. The Receiver herein was appointed and qualified on May 8, 1931, prior to the delinquency date which would attach to the tax

amount. The Receiver represents that claim was filed with him about the 27th of May, 1931, for the amount of the tax and penalty, and that the Receiver disapproved the claim so far as the penalty was concerned. He sets forth that the State of California had taken no steps to contest the action of the Receiver until the filing of the present petition, which is of date July 31, 1935.

I am not disposed to hold that the claimant is barred from asking the court to now pass upon its claim for preferential payment. The question as to the legality of the tax was raised in other proceedings brought in the court. The litigation referred to resulted in a decision sustaining the tax against the various objections urged against it. The case was that of Pauley, Receiver, vs. State of California, 75 Fed. (2d) 120.

The Receiver has suggested in argument that the decision in the Pauley case is not controlling here because the Act of the Legislature there considered embodied amendments not in force when the tax claimed against this Receiver accrued. The Receiver's position is, that while it is true that the State law in force at the time the license tax here concerned accrued provided that such taxes should become a lien upon the property of the distributor, no method or procedure for enforcing such lien was provided, and hence no right to preference could be claimed. The law in effect at the important time provided, in part, as follows:

"Said tax shall be a lien upon all the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof."

(Calif. Stats. 1925, page 659, Sec. 4.)

This Act was amendatory of an Act of the California Legislature of the year 1923, which contained no lien provisions, but did contain the provision that it would be the duty of the Attorney General of the State, at the request of the State Controller, "to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued." The Act of 1925, the lien provisions of which are quoted above, did not amend the 1923 Act in respect to the provision for the bringing of suit.

I have made a very careful study of available decisions bearing on the question and am quite clear in my mind as to these conclusions:

1. Where a taxing statute provides that a lien shall be affixed to secure payment, such lien is paramount to the claims of all creditors, secured and unsecured.

2. Where no lien is provided for to secure the payment of the tax, the tax is nevertheless a preferential claim as against unsecured creditors, but not as against lien creditors.

The subject is quite elaborately treated of in the case of Marshall v. New York, 254 U. S. 380. The Supreme Court there cited the lien provisions of the law of New York then under consideration, which were as follows:

"Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association, liable to pay the same from the time when it is payable until the same is paid in full."

And the Court added as its own observation:

"By reason of that provision the annual franchise tax takes priority over encumbrances on the corporate property."

In that case the District Judge had in a receivership matter allowed as preferred one class of taxes covered by the lien provisions, and denied predominating preference to license taxes not included in the lien provisions. As to the latter, the Supreme Court said:

"Here it is not sought to gain priority over a lien existing at the time when the receiver was appointed; and the priority over unsecured creditors is granted by the common law of New York."

The fact that in addition to the lien provisions first incorporated in the California Act of 1925, there was left undisturbed the provision in the 1923 Act for the bringing of an action at law, does not, to my mind, destroy the lien right. The lien was given and was to

remain until the tax was paid, whatever the method of enforcement might be. It may have been that the leaving of the provision for an action at law was not an inadvertence but was the result of design, in order that the right might be given to the taxpayer to contest the correct amount of the tax. Because the statute furnished one right of action does not, to my mind, exclude other remedies which the State might have had under appropriate proceedings to enforce its lien. The Receiver was appointed herein before the delinquent penalty date arrived and it was proper for the State to make its claim as a creditor in the way it did. However, claimant has not the right to collect penalties as against the Receiver. As to whether it has the right to collect interest is another question. I think, however, that the usual rule should be applied; that interest against a receivership estate may not be collected unless all creditors are paid in full and there is an excess of assets from which interest payment may be made.

IT IS ADJUDGED THEREFORE, that the State of California has a preferential claim over all creditors for the amount of $34,142.99. An exception is noted in favor of all parties adversely affected by this order.

Dated October 25, 1935.

Wm. P. James
U. S. District Judge.

[Endorsed]: Filed Oct. 25, 1935. R. S. Zimmerman, Clerk By Murray E. Wire, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The petition of the State of California for an order directing the receiver herein to allow and pay the claim of said State as a preferred and lien claim and for general relief, came on regularly for hearing before the above entitled court, the Hon. Wm. P. James, Judge presiding, on the 16th day of September, 1935, said receiver being represented by his attorney B. J. Bradner, and said State of California being represented by its attorney U. S. Webb, Attorney General, by John O. Palstine, Deputy Attorney General.

At said hearing said claimant introduced in evidence a certified copy of the assessment roll of the State Controller of the State of California, showing the Motor Vehicle Fuel Tax assessed by said State against the Lake View Oil and Refining Company, a corporation, the defendant in the above entitled proceeding, on account of motor vehicle fuel distributed by said corporation during the first quarter of the year 1931, and showing certain penalties added thereto for nonpayment thereof. No further evidence was introduced, and the matter was argued by counsel and submitted to said court upon said evidence and upon the files and records herein. Said court has duly considered said evidence and the files herein, and the arguments and briefs of counsel, and being fully advised in the premises, now finds the following:

FINDINGS OF FACT.

I.

During the quarter year commencing January 1, 1931 and ending March 31, 1931, the Lake View Oil and Refining Company, a corporation, produced, refined, manufactured and compounded within the State of California, and sold and delivered therein 1,149,595 gallons of motor vehicle fuel, subject to tax under the provisions of the California Motor Vehicle Fuel Tax Law (California Statutes 1923, page 571 as amended). No part thereof was exported or sold for exportation, or exported for use outside of said state, or sold to the government of the United States, or any part thereof, for official use.

II.

Thereafter and on or before the 30th day of April, 1931, the said Board of Equalization of the State of California computed the license tax due or to become due from said corporation because of such sales and deliveries so made by it and they found a net tax to be due in the sum of $34,142.99, which sum said Board of Equalization thereupon extended upon a tax roll prepared and kept for the purpose, and on or before the 30th day of April, 1931, delivered the said tax roll to the State Controller of said state and said State Controller did thereafter, as required by law, notify said corporation that said license tax in said sum was due from it and payable to the State Controller on or before the 15th day of May, 1931.

III.

On May 8, 1931, the complaint in the above entitled proceeding was filed and the receiver of the defendant appointed.

IV.

Said tax was not paid on or before May 15, 1931, at 5 o'clock P. M., or at all, and the whole of said tax remains due, owing and unpaid. That upon said tax being unpaid on said 15th day of May, 1931, at 5 o'clock P. M., said State Controller did thereupon add thereto upon said assessment roll the sum of $3414.29 or 10% of said tax for delinquency. That no portion of said penalty has been paid.

V.

On or about May 28, 1931, the State Controller of the State of California, on behalf of said state, filed with the receiver herein a proof of claim for said tax, including said penalties, by which claim it was asserted that by the provisions of said California Motor Vehicle Fuel Tax Law said tax constitutes a lien upon all of the property of said defendant herein, which lien attached as of the date of the delivery or distribution of said motor vehicle fuel, having the effect of an execution duly levied against all property of said defendant herein and remains until said tax is paid or said property sold for the payment thereof, and further asserting that said claim being a claim for tax due and unpaid to the State of California,

constitutes a prior claim against the estate of the defendant herein.

VI.

Said tax in the sum of $34,142.99, levied and assessed on account of distributions during the first quarter of the year 1931, constituted and constitutes a lien upon all of the property of said Lake View Oil and Refining Company, a corporation, which lien attached at the time of the delivery or distribution subject to the tax, and which lien had and has the effect of an execution duly levied against all property of said company, and which lien remains until the tax is paid or the property sold for the payment thereof.

From the foregoing facts the court makes the following:

CONCLUSIONS OF LAW.

I.

The State of California has a valid claim herein of $34,142.99, which claim is prior to the claim of other creditors and which claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation, which lien attached at the time of the delivery or distribution subject to the tax, and which lien has the effect of an execution duly levied against all property of said company, and which lien shall remain until the tax is paid or the property sold for the payment thereof.

II.

The penalty in the amount of $3,414.29, added to said tax is not a lien and is not entitled to priority or to payment at all from the estate of the defendant, or at all.

III.

The State of California is not entitled to interest unless and until all creditors are paid in full and there is an excess of assets from which interest payment may be made.

Dated: December 28, 1935.

Wm. P. James,
DISTRICT JUDGE.

The foregoing Findings of Fact and Conclusions of Law are hereby approved as to form and it is stipulated that the same may be filed in the above proceeding nunc pro tunc as of November 4th, 1935, and in lieu of the Findings of Fact and Conclusions of Law heretofore on said date filed herein.

BRADNER and WEIL,

By B. J. Bradner,

Attorneys for Paul J. Hisey, Receiver.

U. S. WEBB,

Attorney General

By JOHN O. PALSTINE

Deputy Attorney General

Attorneys for the State of California.

It is so ordered.

Wm. P. James

District Judge

[Endorsed]: Filed Dec 28-1935 nunc pro tunc Nov. 4-1935 R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSES]

ORDER
RE. CLAIM OF STATE OF CALIFORNIA.

THIS CAUSE came on to be heard on the 16th day of September, 1935, and after evidence was submitted, was argued by counsel; and that thereupon upon consideration thereof,

IT WAS AND IS ORDERED, ADJUDGED AND DECREED as follows, viz:

I.

The State of California has a valid claim herein of $34,142.99, which claim is prior to the claim of other creditors and which claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation, which lien attached at the time of the delivery or distribution subject to the tax, and which lien has the effect of an execution duly levied against all property of said company, and which lien shall remain until the tax is paid or the property sold for the payment thereof.

II.

The penalty in the amount of $3,414.29, added to said tax is not a lien and is not entitled to priority or to payment at all from the estate of the defendant, or at all.

III.

The State of California is not entitled to interest unless and until all creditors are paid in full and there is an excess of assets from which interest payment may be made.

Dated: December 28, 1935.

Wm. P. James,
DISTRICT JUDGE.

Decree entered and recorded nunc pro tunc Nov. 4-1935

R. S. ZIMMERMAN Clerk.
By MURRAY E. WIRE
Deputy Clerk,

The foregoing order is hereby approved as to form and it is stipulated that the same may be filed and entered in the above proceeding nunc pro tunc as of November 4th, 1935, and in lieu of the order heretofore on said date filed and entered herein.

Dated: NOVEMBER 12, 1935.

BRADNER and WEIL
Jerold E. Weil
Attorneys for Paul J. Hisey, Receiver.

U. S. WEBB, Attorney General
By JOHN O. PALSTINE
Deputy Attorney General,
Attorneys for the State of California.

It is so ordered

Wm. P. James
District Judge

[Endorsed]: Filed Dec. 28-1935 Nunc pro tunc Nov. 4-1935 R. S. Zimmerman, Clerk, By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

NORA L. POWERS AND GEORGIANNA R. JUDD,	)	
Complainants,	)	PETITION FOR APPEAL AND
vs.	)	ORDER ALLOWING APPEAL.
LAKE VIEW OIL AND REFINING COMPANY, a corporation,	)	
Defendant.	)	

TO THE HONORABLE WILLIAM P. JAMES, JUDGE OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

The State of California, claimant and appellant herein, feeling itself aggrieved by that portion of the order of the above court dated November 4, 1935, ruling upon and denying its claim for penalties and for interest on its tax claim, prays the allowance of an appeal by said State of California, from said portion of said order, to the United States Circuit Court of *Appeal* for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and prays that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to said Circuit Court of Appeals, and prays that an order be made fixing the amount of any bond required of appellant herein.

Dated: November 16, 1935.

U. S. WEBB,
Attorney General of the State of California,
By John O. Palstine
Deputy Attorney General,

Attorneys for the State of California, Claimant and Appellant.

ORDER ALLOWING APPEAL.

Upon reading the foregoing Petition for Appeal, and upon the files and records herein,

IT IS ORDERED that an appeal be, and the same is hereby allowed the State of California, to have the United States Circuit Court of *Appeal* for the Ninth Circuit review that portion of the Order entered herein on November 4, 1935, ruling upon and denying the claim of said State for penalties and interest upon its tax claim, and

IT IS FURTHER ORDERED that citation be issued as provided by law, and that a transcript of the record be prepared by the Clerk of this court and transmitted to said Circuit Court of *Appeal* so that he shall have the same in said Circuit Court within thirty (30) days of this date.

IT IS FURTHER ORDERED that cost bond in said appeal be and the same is hereby fixed in the sum of $250.00.

Dated: November 19, 1935.

Wm P. James
JUDGE.

[Endorsed]: Filed Nov. 19, 1935. R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ASSIGNMENTS OF ERROR.

COMES NOW the State of California, claimant and appellant herein, and respectfully urges that the above entitled Court erred in making its order dated November 4, 1935, relating to the claim of said State, and presents, in connection with its petition for appeal from said order, the following assignments of error:

I.

That said Court erred in failing to find that the penalty of $3414.29, added to the tax allowed as a prior and lien claim herein, became and was and is a part of said tax so allowed.

II.

That said Court erred in failing to find that said penalty was and is due and owing to the said claimant.

III.

That said Court erred in failing to find that said penalty was and is a proper and allowable claim in the within receivership proceedings.

IV.

That said Court erred in failing to find that said penalty was and is a prior claim herein.

V.

That said Court erred in failing to find that said penalty was and is a lien upon all of the property of the said Lake View Oil and Refining Company, a corporation, which lien attached at the time of the delivery or dis-

tribution subject to the tax, with the effect of an execution duly levied against all property of said company, and remaining until said tax and penalty are paid or the property sold for the payment thereof.

VI.

That said Court erred in making its conclusion of law that said penalty is not a lien and is not entitled to priority or to payment at all from the estate of the defendant, or at all.

VII.

That said Court erred in making its conclusion of law that said State of California is not entitled to interest on its claim as allowed until all creditors are paid in full and there is an excess of assets from which interest payment may be made.

VIII.

That said Court erred in making its order that said penalty is not a lien and is not entitled to priority or to payment at all from the estate of the defendant, or at all.

IX.

That said Court erred in making its order that said State of California is not entitled to interest on its claim as allowed until all creditors are paid in full and there is an excess of assets from which interest payment may be made.

X.

That said Court erred in failing to make its conclusion of law and order that said penalty became, and was and is a part of said tax.

XI.

That said Court erred in failing to make its conclusion of law and order that said penalty was and is due and owing to said claimant.

XII.

That said Court erred in failing to make its conclusion of law and order that said penalty was and is a proper and allowable claim herein.

XIII.

That said Court erred in failing to make its conclusion of law and order that said penalty was and is a prior claim herein.

XIV.

That said Court erred in failing to make its conclusion of law and order that said penalty was and is a lien upon all of the property of the said Lake View Oil and Refining Company, a corporation, which lien attached at the time of the delivery or distribution subject to the tax, with the effect of an execution duly levied against all property of said company, and remaining until said tax and penalty are paid or the property sold for the payment thereof.

XV.

That said Court erred in failing to make its conclusion of law and order that said claimant was and is entitled to interest if and when there are sufficient assets of the estate herein to pay in full its prior and lien claim and any other claims of equal rank and dignity, with interest accruing during receivership, even though what remains may be insufficient to pay claims of a lower rank and dignity.

WHEREFORE, the State of California, claimant and appellant herein, prays that said portions of said order dated November , 1935, disallowing said claim for penalties and interest, be reversed, and that an order be made and entered reversing said portions of said order of the District Court herein, and allowing as a prior lien claim said claim for the penalty added to the tax for which said State's claim has been allowed as a prior and lien claim herein, and ordering that said State is entitled to and the Receiver herein shall pay, interest on the claim of said State as allowed, if and when there are sufficient assets of the estate herein to pay in full said claim and any other claims of equal rank and dignity with interest accruing thereon during receivership, even though the remaining assets of said estate may be insufficient to pay claims of a lower rank and dignity, and for costs herein and such other and further order and relief as may be meet and proper in the premises.

Dated: November 16, 1935.

U. S. WEBB,
Attorney General,
By John O. Palstine
Deputy Attorney General,
Attorneys for State of California, Claimant and Appellant.

[Endorsed]: Filed Nov. 19, 1935. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation duly organized and doing business under and by virtue of the laws of the State of Maryland, and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, as Surety, is held and firmly bound unto the State of California, in the penal sum of Two Hundred Fifty and No/100 - - ($250.00) Dollars, to be paid to the said State of California, Appellee, its successors and assigns, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

Signed, sealed and dated this 25th day of November, 1935.

WHEREAS, Paul J. Hisey, as Receiver for Lake View Oil & Refining Company, a corporation, Appellant in the above entitled suit, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth *District,* from a judgment made and entered in the above entitled cause on the 4th day of November, 1935 by the District Court of the United States for the Southern District of California, Central Division.

NOW, THEREFORE, the condition of the above obligation is such that if the said Paul J. Hisey, as Receiver for Lake View Oil & Refining Company, a corporation, Appellant, shall prosecute his said appeal to effect, and answer all costs which may be adjudged against him if he fails to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By W. M. Walker

Attorney in Fact

Attest S. M. Smith

Agent

Examined and recommended for approval as provided in Rule 28.

Jerold E. Weil

Attorney

I hereby approve the foregoing bond this 25 day of November, 1935

Wm P. James

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

On this 25th day of November, 1935, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and S. M. Smith known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Theresa Fitzgibbons

Notary Public in and for the State of California, County of Los Angeles.

My Commission Expires May 3, 1938

[Endorsed]: Filed Nov 25 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

NORA L. POWERS AND GEORGIANNA R. JUDD, Complainants, vs. LAKE VIEW OIL AND REFINING COMPANY, a corporation, Defendant.	In Equity No. T-121-J PETITION OF RECEIVER FOR APPEAL AND ORDER ALLOWING APPEAL.

TO THE HONORABLE WILLIAM P, JAMES, JUDGE OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

PAUL J. HISEY, Receiver, Appellee and Cross-Appellant herein, feeling himself aggrieved by that portion of the Order of the above entitled Court, dated November 4, 1935, providing that the State of California has a valid claim herein of $34,142.99, and that said claim is prior to the claim of other creditors, and that said claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation, and that said lien attached at the time of delivery or distribution subject to the tax, and that said lien has the effect of an execution duly levied against all the property of said company, and that said lien shall remain until the tax is paid

or the property sold for the payment thereof, prays the allowance of an appeal by said Receiver, from said portion of said Order, to the United States Circuit Court of *Appeal* for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and prays that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said order was based, duly authenticated, be sent to said Circuit Court of *Appeal,* and prays that an Order be made fixing the amount of any bond required of this appellant.

Dated: November 25, 1935.

Paul J. Hisey
PAUL J. HISEY

BRADNER & WEIL
Jerold E. Weil

By JEROLD E. WEIL
Attorneys for said Receiver,
Appellee and Cross-Appellant.

ORDER ALLOWING APPEAL.

Upon reading the foregoing Petition, and upon the files and records herein,

IT IS HEREBY ORDERED that an appeal be, and the same is hereby allowed PAUL J. HISEY, the Receiver herein, to have the United States Circuit Court of *Appeal* for the Ninth Circuit review that portion of the Order entered herein on November 4, 1935, providing that

the State of California has a valid claim herein of $34,142.99, and that said claim is prior to the claim of other creditors, and that said claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation, and that said lien attached at the time of delivery or distribution subject to the tax, and that said lien has the effect of an execution duly levied against all the property of said company, and that said lien shall remain until the tax is paid or the property sold for the payment thereof, and

IT IS FURTHER ORDERED that citation be issued, as provided by law, and that a transcript of the record be prepared by the Clerk of this Court, and transmitted to said Circuit Court of *Appeal* so that he shall have the same in said Circuit Court within thirty (30) days of this date.

IT IS FURTHER ORDERED that cost bond in said appeal be the same as hereby fixed in the sum of $250.

Dated: November 25, 1935.

Wm. P. James
JUDGE.

The clerk will approve the bond
W. P. J.

[Endorsed]: Filed Nov. 25, 1935. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

RECEIVER'S ASSIGNMENTS OF ERROR

Comes now PAUL J. HISEY, Receiver, Appellee and Cross-Appellant herein, and respectfully urges that the above entitled Court erred in making its Order dated November 4, 1935, relating to the claim of the State of California, and presents in connection with his petition for appeal from said Order, the following Assignments of Error:

I.

That said Court erred in finding that the alleged tax, in the sum of $34,142.99 or any part thereof, was and is a proper and allowable claim in the within receivership proceedings.

II.

That said Court erred in finding that said alleged tax, in the sum of $34,142.99 or any part thereof, constituted and constitutes a lien upon all of the property of said Lake View Oil and Refining Company, a corporation.

III.

That said Court erred in finding that said Lien attached at the time of the delivery or distribution claimed to be subject to said alleged tax.

IV.

That said Court erred in finding that there was any delivery or distribution subject to tax.

V.

That said Court erred in finding that said lien had and has the effect of an execution duly levied against all of the property of said company.

VI.

That said Court erred in finding that said lien remains until said alleged tax is paid or the property sold for the payment thereof.

VII.

That said Court erred in making its Conclusion of Law that the State of California has a valid claim herein of $34,142.99 or any part thereof.

VIII.

That said Court erred in making its Conclusion of Law that said claim is prior to the claim of other creditors.

IX.

That said Court erred in making its Conclusion of Law that said claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation.

X.

That said Court erred in making its Conclusion of Law that said lien attached at the time of delivery or distribution subject to said alleged tax.

XI.

That said Court erred in making its Conclusion of Law that there was any delivery or distribution subject to any tax.

XII.

That this Court erred in making its Conclusion of Law that said lien has the effect of an execution duly levied against all of the property of said company.

XIII.

That said Court erred in making its Conclusion of Law that said lien shall remain until the tax is paid or the property sold for the payment thereof.

XIV.

That said Court erred in failing to find that the State of California has no valid claim herein.

XV.

That said Court erred in failing to find that the claim of the State of California is not entitled to any priority.

XVI.

That said Court erred in failing to make a Conclusion of Law that the State of California has no valid claim herein.

XVII.

That said Court erred in failing to make a Conclusion of Law that the claim of the State of California is not entitled to any priority.

XVIII.

That said Court erred in making its Order that the State of California has a valid claim herein of $34,142.99 or any part thereof.

XIX.

That said Court erred in making its Order that said claim is prior to the claim of other creditors.

XX.

That said Court erred in making its Order that said claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation.

XXI.

That said Court erred in making its Order that said lien attached at the time of delivery or distribution, subject to the tax.

XXII.

That said Court erred in making its Order that there was any delivery or distribution subject to tax.

XXIII.

That said Court erred in making its Order that said lien has the effect of an execution duly levied against all property of said company.

XXIV.

That said Court erred in making its Order that said lien shall remain until the tax is paid or the property is sold for the payment thereof.

XXV.

That said Court erred in failing to make its Conclusion of Law and Order that the State of California has no valid claim herein.

XXVI.

That said Court erred in failing to make its Conclusion of Law and Order that the State of California has no claim herein which is entitled to any priority.

WHEREFORE, PAUL J. HISEY, Receiver, Appellee and Cross-Appellant herein, prays that said portion of said Order, dated November 4, 1935, providing that the State of California has a valid lien herein of $34,142.99 and that said claim is prior to the claim of other creditors, and that said claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation, and that said lien attached at the time of delivery or distribution subject to the tax, and that said lien has the effect of an execution duly levied against all of the property of said company, and that said lien shall remain until the tax is paid or the property sold for the payment thereof be reversed, and that the whole thereof be reversed, and that an Order be made and entered reversing said portion of said Order of the District Court herein, and disallowing said $34,142.99 or any part thereof as a claim herein, either with priority or otherwise, and for such other, further and general relief as may be meet and proper in the premises.

Dated: November 25, 1935.

BRADNER & WEIL
Jerold E. Weil

By JEROLD E. WEIL
Attorneys for Receiver
Appellee and Cross-Appellant

[Endorsed]: Filed Nov. 25, 1935 R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

BOND ON RECEIVER'S APPEAL.

KNOW ALL MEN BY THESE PRESENTS that the undersigned, AMERICAN SURETY COMPANY OF NEW YORK, a corporation, duly organized and existing under the laws of the State of New York, having its principal place of business at 100 Broadway, New York City, New York, and duly authorized to transact a general surety business in the State of California, is held and firmly bound unto PAUL J. HISEY, AS RECEIVER OF LAKE VIEW OIL AND REFINING COMPANY, A CORPORATION, Appellee, in the penal sum of TWO HUNDRED FIFTY AND NO/100 DOLLARS ($250.00), for the payment of which said Surety binds itself and its successors, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, lately at a regular term of the District Court of the United States for the Southern District of California, Central Division, sitting at the City of Los Angeles in said District, in a suit pending in said Court between Nora L. Powers and Georgianna R. Judd, Complainants, and Lake View Oil and Refining Company, a Corporation, as Defendant, being Equity No. T-121-J in Equity on the docket of said Court, an order was entered on November 4, 1935, denying the petition of the State of California, Appellant, for penalties and for interest upon the tax claim of said estate on said date allowed by said Court, and

WHEREAS, the said State of California, Appellant, has been allowed an appeal from said order and a citation has been issued directed to Paul J. Hisey, as Receiver of Lake View Oil and Refining Company, a Corporation, Appellee, citing and admonishing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 18th day of December, 1935.

NOW, THEREFORE, if the said State of California, Appellant, shall prosecute its appeal to effect and answer all costs and damages that may be awarded against it on said appeal, if it fails to make its appeal good, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, said Surety has caused this instrument to be executed and its seal to be hereunto affixed by its duly authorized officers in the City of Los Angeles, State of California, District aforesaid, this 20th day of November, 1935.

AMERICAN SURETY COMPANY OF NEW YORK

By A. M. Wold A. M. Wold
Resident Vice President

[Seal]

Attest: I. Taylor I. Taylor
Resident Assistant Secretary

Premium charged for this bond is $10.00 per annum.

I hereby approved the foregoing bond.

Dated the 26 day of Nov. 1935

Wm P. James
Judge

STATE OF CALIFORNIA,)
County of Los Angeles,) ss.:

On this 20th day of November, A. D. 1935, before me John Gurash, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. M. Wold personally known to me to be the Resident Vice-President and I. Taylor personally known to me to be the Resident Assistant Secretary of the AMERICAN SURETY COMPANY OF NEW YORK, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] John Gurash

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires

My Commission Expires Feb. 18, 1936.

[Endorsed]: Filed Nov 26 1935 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION IN LIEU OF PRAECIPE FOR TRANSCRIPT OF RECORD

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare a transcript of the record on appeal in the above entitled cause including therein the following portion, only, of the record:

1. Proof of Preferred Claim of State of California;
2. Petition for Allowance of said Claim;
3. Answer to said Petition;
4. Findings of Fact and Conclusions of Law;
5. Order re Claim of State of California;
6. Assignments of Error;
7. Petition for Appeal and Order Allowing Appeal;
8. Bond on Appeal, if any;
9 Citation on Appeal;
10. Receiver's Assignments of Error;
11. Petition of Receiver for Appeal and Order Allowing Appeal;
12. Bond on Receiver's Appeal;
13. Citation on Receiver's Appeal;
14. Stipulation in Lieu of Praecipe for Transcript;
15. Certificate of Clerk to Transcript of Record.
16. Opinion of Wm. P. James, District Judge herein, dated October 25, 1935.

IT BEING HEREBY STIPULATED that the foregoing shall constitute the Transcript of Record hereon on this appeal, and

IT BEING FURTHER STIPULATED that instead of writing and copying the names and titles of court, complainants and defendant, and the number of the cause, the same may, in said Transcript of Record on this appeal, be abbreviated as follows: (Title of Court and Cause); and that there need not be included in said Transcript of Record the backs and endorsements which appear on the original covers on file herein, save and except the filing endorsement of the Clerk.

Dated this 25 day of November, 1935.

BRADNER & WEIL

By JEROLD E. WEIL
Jerold E. Weil

Attorneys for Receiver,
Appellee and Cross-Appellant.

U. S. WEBB, Attorney General,

By John O. Palstine
Deputy Attorney General,

Attorneys for State of California,
Claimant, Appellant and Cross-Appellee.

[Endorsed]: Filed Nov., 27, 1935 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 55 pages, numbered from 1 to 55, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation on appeal; affidavit of service of citation on appeal; citation on cross-appeal; proof of preferred claim; petition for allowance of said claim; order re claim of the State of California; answer to petition; opinion and order; findings of fact and conclusions of law; order re amount of claim of the State of California; petition for appeal and order allowing appeal; assignments of error; bond for costs on appeal; petition for cross-appeal and order allowing cross-appeal, assignments of error on cross-appeal; bond on cross-appeal and stipulation in lieu of praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to.....

and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-five and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8088

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

R. L. POWERS and GEORGIANA R. JUDD,
Complainants,

vs.

LAKE VIEW OIL AND REFINING COMPANY, a corporation,
Defendants.

STATE OF CALIFORNIA,
Appellant and Cross-Appellee,

vs.

PAUL J. HISEY, as Receiver of Lake View Oil and Refining Company, a corporation,
Appellee and Cross-Appellant.

APPELLANT'S BRIEF

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No. 8088

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STATEMENT OF FACTS

During the quarter year commencing January 1, 1931, and ending March 31, 1931, the Lake View Oil and Refining Company, a corporation, produced and delivered within the State of California certain motor vehicle fuel subject to tax under the

provisions of the California Motor Vehicle Fuel Tax Law, viz, California Statutes 1923, page 571, as amended (Tr., p. 32a, Par. I). Accordingly, there was thereafter assessed against said company, pursuant to said law, a tax in the sum of $34,149.99, and said company was duly notified that said sum was due and payable to the State Controller on or before the fifteenth day of May, 1931. (*Ibid.,* Par. II.)

On May 8, 1931, the complaint in the above entitled receivership proceeding was filed and the receiver of the defendant appointed. (Tr., p. 32b, Par. III.)

No portion of said tax has been paid. Upon said tax being unpaid on May 15, 1931, at 5 p.m., said State Controller, pursuant to said law, added thereto, upon the assessment roll, the sum of $3,414.29, or 10 per cent of said tax, for delinquency. No portion of said penalty has been paid. (Tr., p. 32b, Par. IV.)

On or about May 28, 1931, said State Controller, on behalf of the State of California, filed with the receiver a proof of claim for said tax including said penalties, by which claim it was asserted that the same constituted a lien upon all of the property of said Lake View Oil and Refining Company, a corporation, and also constituted a prior and preferred claim against the estate of said company in said receivership proceeding. (Tr., p. 32b, Par. V; see also Tr., pp. 5 to 8.)

On July 31, 1935, said receiver having refused

to allow said claim, the State of California filed its petition for and obtained an order directing said receiver to show cause why said claim should not be allowed. (Tr., pp. 9 to 12.) Said receiver filed his answer thereto (Tr., pp. 13 to 26) and, after a hearing duly and regularly held, said court rendered its opinion (Tr., pp. 27 to 31) pursuant to which said court made and signed its Findings of Fact and Conclusions of Law (Tr., pp. 32 to 32e) and its order thereon. (Tr., pp. 33 and 33a.)

By this order it was determined that the State of California has a valid tax claim in said receivership proceeding in the amount of $34,142.99, which claim is a prior and preferred claim and also constitutes a lien upon all of the property of said Lake View Oil and Refining Company, attaching as of the time of the delivery or distribution subject to said tax. (Tr., p. 33, Par. I.) Said order further determines that the aforesaid penalty in the amount of $3,414.29 added to said tax, is not a lien, is not entitled to priority, nor to payment at all from the estate of said company or at all. (Tr., p. 33, Par. II.) Finally, it was determined by said order that the State of California is entitled to interest, only if and when *all* creditors are paid in full and there is an excess of assets from which interest payments may be made. (Tr., p. 33, Par. III.)

The State of California has appealed from the portions of said order relating to said penalty and said interest. (Tr., pp. 34 to 39.) The receiver, on the other hand, has appealed from said order

allowing the tax claim in the amount of $34,142.99 as heretofore stated. (Tr., pp. 43 to 50.)

This present brief is directed solely to the appeal taken by said State of California. Separate cross-appellant's and cross-appellee's briefs will be filed with regard to the issues raised by said cross-appeal.

The issues raised upon the present appeal are: first, whether the claim for said penalty in the amount of $3,414.29 added to said tax was an allowable claim, and if so, whether it constituted a prior and preferred claim against, or a lien upon the assets of said Lake View Oil and Refining Company; secondly, whether the right of the State of California to interest should be limited so as to preclude its recovery of interest unless and until all creditors are paid in full and there is an excess of assets from which interest payments may be made. We shall discuss these points in the order mentioned.

POINT I

THE TAX PENALTY CLAIMED HEREIN CONSTITUTES A VALID CLAIM AGAINST THE RECEIVERSHIP ESTATE AND IS A PREFERRED AND LIEN CLAIM

The question of the validity of the state's claim in so far as it included the aforesaid penalty, and the questions of the preferred and lien status of said portion of said claim, are so closely connected that they will all be considered under this one point.

During the first quarter of the year 1931 and

until March 30, 1931, section 4 of the California Motor Vehicle Fuel Tax law read as follows:

> "SEC. 4. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. Said tax shall be a lien upon all the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock P.M. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency."
>
> (See Calif. Statutes 1925, page 659.)

The penalty here in question, it is true, accrued subsequent to the appointment of the receiver. The receiver was appointed on May 8, 1931, and said penalty accrued by reason of the failure to pay the tax in question on or before May 15, 1931, at 5 o'clock p.m. The tax, however, had already accrued prior to the appointment of the receiver.

On principle, there appears to be no reason why the liability of a receiver for tax penalties should be any different from the liability of any other tax debtor. That he is liable for taxes, the same as any other person, is too well settled to require the citation of authority. (Compare in this regard, Judicial Code section 65, 28 U. S. C. A. section 124, requiring receivers to manage property in their possession according to the requirements of the valid laws of the state in which such property is situated; *Gillis* vs. *State of California,* 55 Sup. Ct. 4.) For present purposes it is necessarily assumed that the principal tax item is itself valid. If the receiver is successful in his contention that the entire tax is invalid, then, of course, the penalty must fall with said tax. However, if the state is, as the District Court has held, entitled to said *tax,* it is not apparent upon what basis it can at the same time be held that the state is *not* entitled to the penalty which is prescribed by the same tax law. In fact, the court below, by its opinion, seems to recognize that the penalty did in fact accrue, but for some reason it is held, nevertheless, that said penalty can not be collected in these proceedings. Thus, the court below said:

> "The Receiver was appointed herein before the delinquent penalty date arrived and it was proper for the State to make its claim as a creditor in the way it did. However, claimant has not the right to collect penalties as against the receiver." (Tr. p. 31.)

What there is about the position of the receiver that makes him above the state tax law is not pointed out. On the contrary, the authorities uniformly hold that the receiver is *not* exempt from the provisions of state tax laws. While the decisions relating to taxes in general constitute, by analogy, authority in support of this proposition, they will not be particularly referred to, for the array of decisions specifically holding receivers liable for the payment of *tax penalties* is so formidable as to leave no room for doubt as to what the law is.

In *First National Bank of Houston* vs. *Ewing,* 103 Fed. 168 (1900), the Circuit Court of Appeals for the Fifth Circuit held that, where receivers had been appointed for a railway company on January 7, 1896 (103 Fed. 168 at 170), and in June, 1899, petitions were filed for orders directing the payment of taxes due the State of Texas and certain counties (103 Fed. 168, at 178 to 179) the court below, should have ordered the receivers to pay the total amount of taxes due including principal, interest, penalties and costs for the years 1895, 1896, 1897 and 1898. (103 Fed. 168, at 179 and at 190.) Said Circuit Court therefore modified the decree of the District Court accordingly. (103 Fed. 168, 190-191.) The Supreme Court denied a petition for a writ of certiorari in this case. (21 Sup. Ct. 919, 179 U. S. 686, 45 L. Ed. 386.)

In *Coy* vs. *Title Guarantee & Trust Company,* 212 Fed. 520 (1914), the District Court for the

District of Oregon held that a receiver was liable for the ten per cent delinquency penalty which accrued upon the failure of the receiver to pay, when due, taxes assessed against him. Said court refused, however, to allow recovery of an additional twelve per cent per annum, *after* the time when, by said tax law, it was the prescribed duty of the tax officers to proceed to enforce the payment of said tax. The court so ruled as to said additional sum because the rate prescribed was double the legal rate of interest otherwise fixed by statute, and was therefore treated by the court as an additional penalty. In other words it was held that the receiver was liable for the tax penalties, but that the tax officers could not, by their own failure to perform their express statutory duty, cause *additional penalties* to accrue over an unreasonable period of time. In the principal case the only penalty claimed and the only one provided for by the tax law in question is the one which was added to the amount of the tax on May 15, 1931, upon the receiver's failure to pay said tax. Therefore the question of subsequent penalties accruing, as in the said Oregon case, is not here involved.

In *Coy* vs. *Title Guarantee & Trust Company,* 220 Fed. 90 (1915), the Circuit Court of Appeals for the Ninth Circuit affirmed the aforesaid judgment of the District Court, saying, with regard to the liability of the receiver to taxation:

> "It is too clear for argument that the appointment of a receiver and the taking of prop-

erty into the hands of the court through its officer does not withdraw it from taxation. It remains subject to assessment and to the payment of all legal taxes thereon while in custodia legis, to the same extent as it was while in the possession of the owner. And whether or not such taxes be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected."

220 Fed. 90, 92.

That the court held the same opinion as to the liability of the receiver for tax *penalties* is evidenced by the court's statement in conclusion that:

"We also agree with the Court below in its ruling in respect to the penalties and interest, for the reasons stated in its opinion at page 524, 212 Fed."

220 Fed. 90, at 93.

In *Bright* vs. *State of Arkansas,* 249 Fed. 950 (1918) the Circuit Court of Appeals for the Eighth Circuit held that, where the penalties for nonpayment of a railway franchise tax accrued within less than a month after receivers were appointed, and the state thereafter intervened before any additional tax penalty had accrued, the state was entitled to recover said penalty. The court pointed out that this decision was in accord with the weight

of authority and was impelled by the desirableness of uniformity of decision, citing (at 249 Fed. 950, 953) the two cases of *Coy* vs. *Title Guarantee & Trust Company, supra, First National Bank* vs. *Ewing, supra, and Gray* vs. *Logan County,* 7 Okla. 321, 54 Pac. 485, at 487.

See, also, *Bright* vs. *State of Arkansas,* 249 Fed. 953 (1918), where said Circuit Court of Appeals for the Eighth Circuit reached the same conclusion as to the liability of a receiver for penalties accruing because of the nonpayment of real property taxes. The court stated that there is no better reason why receivers and the creditors they represent should escape the payment of tax penalties than there is why an individual who has been unable to pay his tax upon his homestead when due should escape the payment of the legal penalty for that failure. It is true that the court also pointed out that the taxes and penalties there involved constituted liens upon said real property. That this feature alone, however, would not affect the liability of the receiver herein for the penalty here in question, has been settled by this honorable court in said case of *Coy* vs. *Title Guarantee & Trust Company, supra* (220 Fed. 90 at 92).

In *Spencer* vs. *Babylon Railroad Company,* 250 Fed. 24 (1918), the Circuit Court of Appeals for the Second Circuit held that, where receivers were appointed on January 20, 1911 (250 Fed. 24), and thereafter said railroad corporation restrained the tax officers from selling the property of said com-

pany for the taxes of 1910, 1911, 1912, 1913 and 1914, while said company unsuccessfully contested the validity of said taxes (250 Fed. 24 at 25), penalties and interest should have been allowed in said receivership proceeding. (250 Fed. 24 at 29.) The mere fact that in that case the tax authorities were, by an order directed especially to them, restrained, while the penalties accrued, is no basis for distinguishing said case. For in the principal case there was no action which the tax officers could have taken prior to the delinquency date, even in the absence of the intervention of the court below by way of said receivership proceedings. And, in any event, upon the intervention of said court, the state officers were precluded from proceeding, as effectively as in the cited case. (See *Bright* vs. *Arkansas, supra,* 249 Fed. 953, 954.)

In *McFarland* vs. *Hurley*, 286 Fed. 365 (1923), the Circuit Court of Appeals for the Fifth Circuit held that, where a receiver was appointed in July, 1921, for a company engaged in raising and severing oil in the State of Louisiana, which company, on July 1, 1921, had become obligated to pay, by August 1, 1921, a certain "Severance License Tax" based on production in April, May and June, 1921, said receiver, upon failing to pay said tax within the time prescribed by said state tax law, became liable for the penalties prescribed by said statute, viz, two per cent per month interest and ten per cent attorneys fees. The court said, at pages 366 to 367:

"We think the court was correct in holding that the receivers were liable for the severance taxes. They are custodians of the property for the benefit of the litigants, and the property in their hands should bear whatever tax burdens it would be subject to in the hands of the owners or litigants. *Coy* v. *Title Guarantee & Trust Co.,* 220 Fed. 90, 93, 135 C. C. A. 658, L. R. A. 1915E, 211; *Bright* v. *State of Arkansas,* 249 Fed. 950, 952, 162 C. C. A. 148.

"But we think the court erred in holding that the receivers were not liable for the interest and attorney's fees, which were made by the statute levying the tax a part of the sum due in the event of a failure to pay by the date of maturity.

"The case does not fall within the equitable principle that, where the fund in the receivers' hands is insufficient to pay the principal, no interest is allowed on a claim against such fund. *Thomas* v. *Car Co.,* 149 U. S. 95, 116, 13 Sup. Ct. 824, 37 L. Ed. 663. Here is a claim for taxes which is paramount to other claims. A part of said claim prescribed by the taxing statute is 2 per cent per month and 10 per cent as attorney's fees, where delay is made in payment."

The court then quotes with approval from *Bright* vs. *Arkansas, supra* (249 Fed. 953, 955), and cites also *First National Bank* vs. *Ewing, supra, Coy* vs. *Title Guarantee & Trust Co., supra,* and *Spencer* vs. *Babylon Railroad Co., supra.* The decree of the District Court disallowing said 2 per cent per

month and said 10 per cent attorney's fees was therefore reversed.

In *Gray* vs. *Logan County,* 54 Pac. 485 (Okla. 1898), the court, in holding that the receiver of a bank was liable for penalties upon taxes assessed during the receivership said, at page 487:

> "We are cited to no authority to the effect that there is any distinction between the right of a state to be paid by the receiver the sum of its taxes and its right to be paid the interest and penalties accrued thereon; and, in the absence of authority showing such distinction to exist, we are unable to perceive how, upon principle or reason, the action of the court below in making such distinction, and in refusing to allow accrued penalties to be paid, can be sustained. The validity of the law providing penalties for the nonpayment of taxes is not questioned. They are enforced against all private citizens who neglect to pay their taxes as provided by law. The property in question was in the hands of a receiver when the taxes upon which these penalties ran were levied, and when they became due. It was as much his business to pay those taxes before any penalties ran as it is the duty of any other owner or custodian of property charged with the payment of taxes. That penalties accrued was his fault, and not the fault of the territory or the county. When penalties accrue, they are as much a part of the claim of the state as is the tax itself. The payment of the tax does not relieve from the penalty. The payment of the penalty does not relieve from the payment of the tax. Tax and

> penalty constitute but one claim, and not distinct claims. If the tax be valid, the penalty is valid. It therefore follows that the district court erred in refusing to direct the receiver to pay the several items of penalties accrued upon the taxes levied upon the real estate as shown in the agreed statement of facts."

Clearly the same principle is applicable in the present case.

In *Northern Finance Corporation* vs. *Byrnes,* 5 Fed. (2d) 11, 1925, the Circuit Court of Appeals for the Eighth Circuit, in passing upon the question of the propriety of the receiver's action in borrowing money to pay taxes and penalties which had accrued prior to his appointment as receiver, said, at page 12:

> "It may be conceded at the outset that it was the duty of the federal court to recognize the priority of any claim of the state for taxes which, being a prior lien under the laws of Missouri, became such in the receivership proceeding, and that upon proper application it would have been the duty of the court to make the taxes, including penalties, a prior lien."

While it is true that in the principal case the penalties accrued *subsequent* to the appointment of the receiver, upon taxes which had accrued prior to such appointment, it is not apparent why this fact would require any different decision than is proper in regard to penalties which may have accrued *prior* to the appointment of the receiver. In

either case, the principle that the receiver is liable to whatever tax burden any other person would have to bear is applicable.

In *Board of Commissioners of Sweetwater Co.* vs. *Bernardin,* 74 Fed. (2d) 809, the Circuit Court of Appeals for the Tenth Circuit had under consideration an appeal by tax claimants from the order of the District Court which, amongst other things, disallowed the claim for penalties and interest upon certain taxes. (*First Nat'l Bank of Chicago* vs. *Central Coal & Coke Co.,* 3 Fed. Supp. 433, 438.) There, the "penalty" imposed by statute was the provision that after delinquency certain of the taxes in question should "draw interest at the rate of fifteen per centum per annum until paid or collected by distress or sale * * *." (74 Fed. 2d, 809, 812). Interest and penalties accrued after the property passed into the hands of the receiver (3 Fed. Supp. 433, 438). The claim filed set up said "Interest and Penalties" as a joint item (74 Fed. 2d, 809, 811; 3 Fed. Supp. 433, 434) and it is clear that the court had in mind said portion of said claim as constituting *penalties* as well as interest. The order of the District Court disallowing said portion of said claim was *reversed.* The Supreme Court denied a petition for a writ of certiorari in said case. (55 Sup. Ct. 645.) If a receiver is subject to the terms of a statute prescribing such an interest rate as a penalty for the failure to pay taxes prior to delinquency, it is difficult to perceive why he should not likewise be subject to the terms

of the California statute imposing a single ten per cent penalty for delinquency.

As having some bearing on the general subject of penalties in receivership proceedings see also *Bear River Paper & Bag Co.* vs. *City of Petoskey,* 241 Fed. 53, 57 (6th C. C. A., 1917), and *Mercantile Trust Co.* vs. *Atl. & Pac. R. Co.,* 80 Fed. 18, 36 (Cir. Ct. S. D. Cal. 1897), affirmed in 88 Fed. 140, 160 (9th C. C. A. 1898).

Opposed to this impressive array of authorities is the lone case of *McCormick* vs. *Puritan Coal Mining Co., Inc.*, 41 Fed. (2d) 213 (1930). There the Circuit Court of Appeals for the Third Circuit held that receivers are not liable for tax penalties such as were there involved, accruing subsequent to the appointment of said receivers. However, that court itself recognized that its decision was "contrary to the drift of some decisions." (41 Fed. (2d) 213 at 214.) In fact, the court might well have said that it was contrary to the drift of *all* of the decisions except such decision itself. The court conceded that "had the property come to them burdened with penalties, the receivers, of course, must pay them * * *," but held that penalties *subsequently* accruing were not a valid claim against the receiver, saying: "We think the instant case is controlled by the general rule that after property of an insolvent corporation has passed into the hands of its receivers, interest or penalties for the nonpayment of taxes are not allowed on claims against the funds" (41 Fed. (2d) 213, 214), citing

amongst other cases *Coy* vs. *Title Guarantee & Trust Company, supra,* and *Thomas* vs. *Western Car Company,* 149 U. S. 95 at 114. The former case has been reviewed hereinabove, and clearly does not support the proposition stated by the court. The latter case was the one relied upon by the District Court in its decision in the *Central Coal & Coke Co.* case, *supra* (3 Fed. Supp., 433), but that decision was reversed by the Circuit Court of Appeals in *Board of Commissioners* vs. *Bernardin, supra,* and a review of this latter decision was refused by the Supreme Court. Clearly then, this *Puritan Coal Mining Company* case can not afford any support for the decision of the District Court herein.

It is submitted that the correct principle is, that a receiver is subject to the same tax burden as any other person; that this includes liability for penalties accruing during the receivership as well as for taxes so accruing. In fact, the foregoing authorities in effect hold that tax penalties are in reality but a part of the tax itself, the burden of which, in its entirety, must be borne by receivers the same as any other person. Also, to the effect that, as a general rule, a penalty for delinquency in the payment of a tax *is a part of the tax,* see:

In re Prince & Walter, 131 Fed. 546, 550 (D. Ct. Pa. 1904);

State of Kansas vs. *Bowker,* 4 Kan. 114;

Kansas Pacific Railway Company vs. *Amrine,* 10 Kan. 318;

Missouri etc., Railway Company vs. *Labette County,* 64 Pac. 56 (Kan.);
Village of Westby vs. *Bekkedal,* 178 N. W. 451 (Wis.);
Appeal of City of Titusville, 108 Pa. State 600;
City of Harrisburg vs. *Guiles,* 44 Atl. 48 (Pa.);
cf. *Leavitt* vs. *Bell,* 81 N. W. 614 (Neb.).

There is nothing in said California Motor Vehicle Fuel Tax Law which would require a different interpretation as to the nature of the penalty provided by said law. On the contrary, said section 4, quoted hereinabove, clearly indicates that said penalty is but a part of said tax. Said section, after providing that the taxes shall be paid in quarterly installments and shall be a lien, further provides that "The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock p.m. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency." In other words, such penalty is not a separate item but is a part of the tax, being "added thereto," that is, to the tax. After such penalty has been added thereto the amount of the "tax" due is the original assessment plus the penalty for delinquency. In particular in this regard see the above quotation from *Gray* vs. *Logan County, supra.*

Being a part of the tax, said penalty, in addition to being entitled to recognition as a *valid* claim against the receiver, must, of course, be accorded the same *priority* as the balance of said tax. In this case the court has held, and properly so, that the original assessment is a prior and preferred claim. The penalty, therefore, must also be of this same status. In fact, even if said penalty were not considered a part of said tax, it would, nevertheless, be entitled to priority, if it is a valid claim, at all, of the state. For *all* debts, whether taxes or otherwise, owing to the sovereign, are entitled to *priority* under the common law, which controls in this regard in California. *Pauley* vs. *State of California,* 75 Fed. (2d) 120 (9th C. C. A. 1934); *State of Oregon* vs. *Ingram,* 63 Fed. (2d) 417 (9th C. C. A. 1933).

In determining the status of said penalty as a *lien* claim the foregoing reasoning upon the basis of the penalty being a part of the tax is again applicable. The court below held that the original assessment constituted a lien as provided by section 4 of said Motor Vehicle Fuel Tax Law. It is not apparent how this portion of the claim could be a lien and the remainder thereof not of the same status. In this regard, see in particular the case of *Appeal of City of Titusville, supra* (108 Pa. State 600). There it was held that, where the tax is a lien, the penalty, as a part of the tax, is likewise a lien and entitled to the same priority as any other portion of the tax lien.

That it was the intention of the California Legislature, in creating the lien for motor vehicle fuel taxes, to include therein the penalties which said statute specifies must be added to said taxes upon delinquency, is further evidenced by the fact that, in 1931, when additional remedies were provided for the collection of said tax and for the enforcement of said lien, it was provided that "the Controller shall seize any property, real or personal, used by said distributor in the operation of his business, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the tax due hereunder, *together with any penalty or penalties imposed hereby for such delinquency,* and any and all costs that may have been incurred on account of such seizure and sale." (See amendment by California Statutes 1931, pages 105; italics added. This is but a cumulative remedy provided for the enforcement of the lien theretofore provided by said section 4. See *Pauley* vs. *State of California,* 75 Fed. (2d) 120, at 132. That such legislation may be considered as a legislative construction of the prior act, see *Board of Commissioners* vs. *Bernardin, supra* (74 Fed. (2d) 809, 813-814).

It is submitted, therefore, that the legislature intended that the penalty provided for by section 4 of the Motor Vehicle Fuel Tax Law should be, and it is, as a part of the tax upon which it accrues and to which it is added, a lien upon the property

of the distributor, as is particularly provided by said section 4.

In conclusion, then, with regard to the penalty included in the claim of the State of California, it is submitted that the court erred in holding that said penalty is not a *valid* claim against the receiver herein; that said court also erred in holding that said penalty does not constitute a *preferred* claim against said receiver, of the same status as the tax to which said penalty is added; and that said court further erred in holding that said penalty does not, as does the tax to which it is added, constitute a *lien* upon the property of the said Lake View Oil and Refining Company, as provided by section 4 of said Motor Vehicle Fuel Tax Law.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT THE STATE IS NOT ENTITLED TO INTEREST UPON ITS TAX CLAIM UNLESS AND UNTIL ALL CREDITORS ARE PAID IN FULL AND THERE IS AN EXCESS OF ASSETS FROM WHICH INTEREST PAYMENTS MAY BE MADE

The court below recognized, and properly so, that the mere fact that the property of the tax debtor, the said Lake View Oil and Refining Company, is in *custodia legis,* does not deprive the claim of the State of California of its interest bearing quality. The only dispute in this regard is as to the conditions upon which such interest shall be payable.

The District Court ruled that the State of California is not entitled to interest "*unless and until* all creditors are paid in full and there is an excess of assets from which interest payments may be made." (Tr., p. 33, Par. III; italics added.) It is submitted that in this ruling the court erred. It is the contention of the State of California that, where there are claims of different rank or dignity, and there are sufficient assets of the estate available to pay claims of a higher rank, in full, with interest accruing during receivership, interest will be paid on such claims to the date of payment even though what remains is insufficient to pay claims of a lower rank. The court below should have so ordered payment to be made.

In *Board of Commissioners of Sweetwater County,* 74 Fed. (2d) 809 (1934; certiorari denied, 55 Sup. Ct. 645) the Circuit Court of Appeals for the Tenth Circuit clearly and concisely sets forth the rules in regard to the allowance of interest against estates in *custodia legis,* as follows (the cases cited in the notes to said decision, not being repeated in this quotation):

> "It is a general rule that after an estate of an insolvent has come into custodia legis, interest thereafter accruing on claims against the estate will not be allowed.
>
> Where, however, the assets are sufficient to pay all claims of equal dignity in full with interest accruing during receivership after the costs of administration have been provided for, interest should be allowed and paid on all claims.

> Where a creditor holds a prior lien, he is entitled to interest to the date of payment out of the proceeds derived from the property covered by such lien.
>
> Where there are claims of different rank or dignity and there are sufficient assets of the estate available to pay claims of a higher rank in full with interest accruing during receivership, interest will be paid on such claims to the date of payment, even though what remains is insufficient to pay claims of a lower rank."

Said court having thus recently so clearly stated, with authorities, the rules which are applicable, and said decision having been approved by the Supreme Court by its refusal to grant a writ of certiorari, it would be indeed presumptious to add to the burden of this court by reviewing in detail the cases referred to in said cited case in support of the rules so stated.

Under the facts herein the court below should have ordered interest to be paid in the event there are sufficient assets of the estate available to pay claims of the *same rank and dignity* as the claim of the State of California with interest accruing during receivership and after delinquency, without regard to whether or not what remains is sufficient to pay claims of a lower rank or dignity.

CONCLUSION

In conclusion, then, it is submitted that the claim of the State of California, *including the tax penalty* prescribed by law, should have been allowed

as a *valid* claim against the receivership estate, and should have been recognized as a *prior* claim and as *lien* upon all the property of said Lake View Oil and Refining Company, and said receiver herein should have been ordered to pay interest on said claim, subject only to the condition that there be sufficient assets of the estate available to pay claims of the *same* rank and dignity, in full with interest. The decision of the District Court should be modified accordingly.

Respectfully submitted.

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By JOHN O. PALSTINE,
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Attorneys for Appellant.

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No. 8088

In the United States Circuit Court of Appeals For the Ninth Circuit.

Nora L. Powers and Georgianna R. Judd,

Complainants,

vs.

Lake View Oil and Refining Company, a corporation,

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Appellee and Cross-Appellant.

CROSS-APPELLANT'S OPENING BRIEF.

BRADNER & WEIL,
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No. 8088

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Nora L. Powers and Georgianna R. Judd,

Complainants,

vs.

Lake View Oil and Refining Company, a corporation,

Defendant.

State of California,

Appellant and Cross-Appellee,

vs.

Paul J. Hisey, as Receiver of Lake View Oil and Refining Company, a corporation,

Appellee and Cross-Appellant.

CROSS-APPELLANT'S OPENING BRIEF.

The cross-appellee, State of California, filed its claim against the receivership estate for the total sum of thirty-seven thousand five hundred fifty-seven and 28/100 ($37,-557.28) dollars. This sum was claimed as Motor Vehicle

VII.

That said Court erred in making its Conclusion of Law that the State of California has a valid claim herein of $34,142.99 or any part thereof.

VIII.

That said Court erred in making its Conclusion of Law that said claim is prior to the claim of other creditors.

IX.

That said Court erred in making its Conclusion of Law that said claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation.

X.

That said Court erred in making its Conclusion of Law that said lien attached at the time of delivery or distribution subject to said alleged tax.

XI.

That said Court erred in making its Conclusion of Law that there was any delivery or distribution subject to any tax.

XII.

That said Court erred in making its Conclusion of Law that said lien has the effect of an execution duly levied against all of the property of said company.

XIII.

That said Court erred in making its Conclusion of Law that said lien shall remain until the tax is paid or the property sold for the payment thereof.

XIV.

That said Court erred in failing to find that the State of California has no valid claim herein.

XV.

That said Court erred in failing to find that the claim of the State of California is not entitled to any priority.

XVI.

That said Court erred in failing to make a Conclusion of Law that the State of California has no valid claim herein.

XVII.

That said Court erred in failing to make a Conclusion of Law that the claim of the State of California is not entitled to any priority.

XVIII.

That said Court erred in making its Order that the State of California has a valid claim herein of $34,142.99 or any part thereof.

XIX.

That said Court erred in making its Order that said claim is prior to the claim of other creditors.

XX.

That said Court erred in making its Order that said claim constitutes a lien upon all of the property of the Lake View Oil and Refining Company, a corporation.

XXI.

That said Court erred in making its Order that said lien attached at the time of delivery or distribution, subject to the tax.

XXII.

That said Court erred in making its Order that there was any delivery or distribution subject to tax.

XXIII.

That said Court erred in making its Order that said lien has the effect of an execution duly levied against all property of said company.

XXIV.

That said Court erred in making its Order that said lien shall remain until the tax is paid or the property is sold for the payment thereof.

XXV.

That said Court erred in failing to make its Conclusion of Law and Order that the State of California has no valid claim herein.

XXVI.

That said Court erred in failing to make its Conclusion of Law and Order that the State of California has no claim herein which is entitled to any priority.

I.

The Statute Involved Here Did Not Create a Lien Entitling the State of California to a Priority in Its Claim.

At the outset, we state that we are not unmindful of the decision of this Court in the case of *Pauley, Receiver, v. State of California,* reported in 75 Fed. (2nd) 120. However, we respectfully submit that the decision in that case is not controlling here, for the reason that the statutes involved in the two cases are substantially different and for the other reasons which we shall suggest herein.

The tax claimed here is for the first quarter of the calendar year 1931, prior to the 1931 amendments to the act purporting to levy the Motor Vehicle Fuel Tax. The statute involved in this case is the original statute (chapter 267, Calif. Stat. 1923) as amended in 1925, 1927 and 1929. The case of *Pauley v. State of California, supra,* was decided under the 1931 amendments to the act.

The act as amended in 1931 and as involved in the case of *Pauley v. State of California* provided in section 4 thereof in part as follows:

> "* * * The license tax shall be a lien upon all property of the distributor, attaching at the time of delivery or distribution subject to said license tax, having the effect of an execution duly levied against all property of the distributor, and remaining until the license tax is paid, or the property sold in payment thereof. * * *.
>
> "Notice to debtors, etc.—In the event that any distributor is delinquent in the payment of his license tax hereunder, the controller may give notice of the amount of such delinquency by registered mail to all

persons having in their possession, or under their control, any credits or other personal property belonging to such distributor, * * * and thereafter any person so notified shall neither transfer nor make other disposition of such credits, other personal property or debts until the controller shall have given his consent * * * or until twenty days shall have elapsed. * * *.

"Collection of tax if delinquent. Seizure of property. Notice of intended sale.—Whenever any distributor shall be delinquent in the payment of the license tax herein provided, the controller or his duly authorized representative shall proceed forthwith to collect the license tax due from such distributor in the following manner: The controller shall seize any property, real or personal, used by such distributor in the operation of his business, and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the tax due hereunder, together with any penalty or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent distributor in writing at least ten days before the date set for such sale by inclosing a form of such notice in an envelope addressed to said distributor at his last known place of business in this state if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided, however, that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in

three public places in such county or city and county for said ten day period. The said notice shall contain a description of the property to be sold, together with a statement of the amount of the taxes, penalties and costs, the name of the distributor, and the further statement that, unless such taxes, penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

"Sale.—At any such sale, the property shall be sold by said controller or his duly authorized agent in accordance with law and said notice, and the controller shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest title in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the distributor. If, upon any such sale, the moneys so received shall exceed the amount of all license taxes, penalties and costs due the state from such distributor any such excess shall be returned to the distributor, and his receipt therefor obtained. If, for any reason, the receipt of such distributor shall not be available, the controller shall deposit such excess moneys with the state treasurer, as trustee for such owner, subject to the order of such distributor, his heirs, successors or assigns.

"Forfeiture of bond or deposit.—The controller must also immediately transmit notice of such delinquency to the attorney general who shall at once proceed to collect all sums due to the state from any such distributor hereunder by bringing suit against the necessary parties to effect forfeiture of the bond or bonds of the distributor or of the money or se-

curities deposited by the distributor with the state treasurer in accordance with the terms of section 2 of this act, reducing any deficiency to judgment against the distributor.

"Remedies cumulative. Assessment-roll as evidence.—It is expressly provided that the foregoing remedies of the state shall be cumulative and that no action taken by the controller or the attorney general shall be or be construed to be an election on the part of the state or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act. * * *"

Amendment, Cal. Stats. 1931, p. 109.

It will thus be seen that the statute as amended in 1931 and under which this Court decided the case of *Pauley v. State of California, supra,* not only provided in so many words for a lien, but also provided in great detail a method and procedure for enforcing the lien.

At the important time involved here the statute, as amended, provided in section 4 thereof only as follows:

"Sec. 4. *Tax, when due and when delinquent.* License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. Said tax shall be a lien upon all the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or

the property sold for the payment thereof. The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock P. M. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency."

Amendment, Cal. Stats. 1925, p. 659.

It will thus be noted that the act at the time involved here merely provided that the tax shall be a lien, but did not provide either in section 4 or elsewhere in the act any method or procedure for enforcing the lien.

But while the statute at the time involved here did not provide a method for enforcing the purported lien, the act did provide a procedure, *and only one procedure,* for collecting the tax. This procedure was by action at law to collect the tax, and is provided for in section 9 of the the statute as amended in 1929. Said section 9, as it existed at the time involved here, provided as follows:

"Section 9. FIXING TAX WHERE NO RETURN IS MADE. DUTY OF ATTORNEY GENERAL. If any distributor shall fail, neglect or refuse to file the reports herein provided, the state board of equalization, immediately after such time has expired, shall proceed to inform itself as best it may regarding the matters and things required to be set forth in such statement, and, from such information as it is able to obtain, shall make a statement showing such matters and things and shall determine and fix the amount of the license tax due to the state from such distributor for such quarter, and shall add to the amount of such license tax a penalty of twenty-five per cent thereof, and shall deliver such statement to the state con-

troller who shall proceed to collect the amount of such license tax with the penalty added thereto, together with interest on the whole thereof at the rate of seven per cent per annum from the date upon which such statement should have been filed together with any penalty for delinquent payment that may have accrued by reason of section 4 of this act but the penalty for delinquent payment shall not apply to or be charged against the penalty provided for in this section for failure to furnish a report and the distributor is thereafter estopped from complaining of the amount thereof.

"Upon the request of the state controller, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued."

Amendment, Cal. Stats. 1929, p. 113.

A tax lien exists only to the extent provided by statute, and where the statute provides a mode for the collection of the tax that is the only mode available. Furthermore, the method of enforcement provided by the statute must be strictly complied with.

24 *Cal. Jur.* pp. 217, 324;

Boskowitz v. Thompson, 144 Cal. 724;

Page v. W. W. Chase Co., 145 Cal. 578.

In the case of *Boskowitz v. Thompson, supra,* the court said on page 730:

"The collection of taxes belongs to the executive branch of the government, and can be assumed by the judiciary only under express legislative authority

> therefor. Courts may inquire into and determine the validity of the assessment or other proceedings, but unless the statute has declared it to be a lien it cannot adjudge it to be one, and if the statute has declared it to be a lien, and provided for its enforcement, its enforcement can be only in the mode provided by the statute. The right of a court of equity to adjudge that a lien exists against certain land carries with it the right to enforce such lien, but the rule is well recognized that a court of equity, as such, and in the absence of statutory authority therefor, has no jurisdiction to enforce a lien that is created by statute and for whose enforcement the statute has provided a mode." (Citing cases.)

And in the case of *Page v. W. W. Chase Co., supra,* the court said on page 583:

> "The lien of a street assessment—like any other tax—is to be enforced only in the mode and to the extent authorized by the legislature."

Furthermore, a lien for taxes does not exist when there is no right to enforce the same. Thus when the right of action is lost, as by the running of the statute of limitations, the lien ceases to exist.

Clark v. City of San Diego, 144 Cal. 361;
Chambers v. Gibson, 178 Cal. 416;
City of San Diego v. Higgins, 115 Cal. 170.

City of San Diego v. Higgins, supra, was an action to recover a judgment for municipal taxes and to subject the property to the lien of the taxes. The court held that the action having been commenced more than three years after the right of action accrued was barred under sec-

tion 338 of the Code of Civil Procedure of the State of California. Said case was cited with approval in *Clark v. City of San Diego, supra,* which latter case was an action to quiet title against a lien for delinquent taxes. The court held that where the right of action for the collection of the taxes is lost under the statute of limitations the lien is extinguished and the judgment of the lower court quieting title in the plaintiff was affirmed. The opinion in the last mentioned case is short, and for the convenience of the court we set forth the body of it in full:

> "This is an action to quiet title. As defenses to the action, defendant pleaded the liens for delinquent taxes for the years 1890 and 1893, and prayed that the taxes be decreed valid and subsisting liens upon the property. Admittedly, upon the authority of the City of San Diego v. Higgins, 115 Cal. 170, and Dranga v. Rowe, 127 Cal. 506, the right of action for the collection of the taxes according to the statute of 1880, page 136, is lost. The court decreed, under section 2911 of the Civil Code, and upon the authority of Dranga v. Rowe, that the lien of the taxes was likewise lost, and quieted plaintiff's title accordingly. It is here contended that a distinction is to be drawn between the case of Dranga v. Rowe and the case at bar, since in the former case the defendant sought affirmative relief that no decree should be rendered quieting plaintiff's title, except upon payment of the assessed taxes, whereas, in the case at bar, it is asked only that the taxes be decreed to constitute subsisting liens. There is, however, no difference in principle between the cases. Dranga v. Rowe was decided upon the theory that the lien was extinguished, and the trial court was therefore correct in its ruling and decision in the case at bar."

The case of *Chambers v. Gibson, supra,* was an action to enforce the statutory lien for inheritance taxes. The court followed the earlier decisions and held that the action was barred by the statute of limitations.

As has been noted, the statute involved here did provide a method for collecting the tax. That method was by action at law. No method whatever was provided for the enforcement of the purported lien.

While we concede, of course, that there is a distinction between a case where there is originally a valid lien which is subsequently extinguished by reason of the running of the statute of limitations on the right to collect the tax, on the one hand, and a case where the statute purports to impose a lien, but instead of providing a method of enforcing the lien provides a different method for collecting the tax, we submit that the distinction is one not involving a substantial difference. We submit that upon principle, if at a certain time there is no tax lien by reason of the fact that the time for enforcing it has elapsed, that then if at a certain time there is no method or right of enforcing a purported lien, no lien in fact exists.

The statute involved here did provide a method for collecting the tax. That method is the only method available for the collection of the tax. The purported lien has at all times been without any method of enforcement. This, of course, was not the situation under the statute at the time involved in the case of *Pauley v. State of California, supra.* We submit that the State of California had no lien, and that, therefore, its claim was entitled to no priority based on any lien.

II.

The Claim Is Not Entitled to Any Priority by Reason of Any Rule of the Common Law Granting a Priority to the Sovereign.

We appreciate the fact that in its decision in the case of *Pauley v. State of California, supra,* this Court referred to a priority existing as to debts due to the sovereign. However, we feel that the decision as to priority was based upon the holding of the court that there was a lien for the taxes. In fact, the concluding words in the opinion, by way of summary, were as follows:

> "To recapitulate, we find that the taxing statutes in question violate neither the Federal nor the State Constitutions; that they have created valid liens in favor of the appellee; and that such liens are entitled to priority over the claims of the general unsecured creditors of the receivership estate."

In view of our contention that the statute involved here did not create a valid lien, we venture to suggest to the court that the common law rule of priority of the claims of the State does not exist in California, by reason of the fact that there are statutes which are inconsistent with such rule of the common law.

We are frank to state that the argument which we are now advancing is in part taken from the brief submitted to this Court in the matter of *Laugharn, as Trustee in Bankruptcy v. State of California,* in which a memorandum decision was rendered by this Court as reported in 77 Fed. (2nd) 1005. However, the last mentioned case was a proceeding in bankruptcy, and involved, therefore, express preferences as to taxes, provided for under sec-

tion 64a of the Bankruptcy Act. The proceeding here is one in an Equity Receivership.

The common law is the rule of decision in the State of California only so long as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state.

Sec. 4468, *Cal. Pol. Code.*

The legislature of the State of California has in the past adopted various acts relating to the liquidation and distribution of the assets of an insolvent estate. The first of such insolvency laws was passed by the legislature in 1852. (Cal. Stats. 1852, p. 69.) No preference was provided for any class of creditors whatsoever. The same is true of the insolvency act passed in 1880. (Cal. Stats. 1880, p. 82.) In 1895 another insolvency law was passed wherein in section 35 thereof it was provided:

> "A creditor whose debts are duly approved and allowed shall be entitled to share in the property and estate pro rata without priority or preference whatsoever other than is provided in this act and in section 1204 C. C. P." (Cal. Stats. 1895, p. 143.)

Section 1204 C. C. P. provides in substance for priority in payment of wages of certain classes of persons, but does not provide any preference whatsoever to the State in the payment of its debts. Section 35 of the act of 1895 has remained without change, and although the act of 1895 has been amended from time to time, no express priority has ever been given to the State.

Such insolvency laws are still a part of the laws of this State, the effect of the National Bankruptcy Act being merely to suspend their operation.

In re Wright, 95 Fed. 802;

In re Bennett, 153 Fed. 673.

We submit that said section 35 of the act of 1895, by expressly providing that debts shall be paid "without priority or preference whatsoever", excludes the State, as well as all other classes of creditors, except those mentioned.

Without further argument on this point we are content to refer to the reasoning in the case of *In re Devlin,* 180 Fed. 170, District Court of Kansas, First Division. The insolvency laws of the State of Kansas provided that "Assignment shall be for the benefit of all creditors of the assignor in proportion to their respective claims." The California statute is even stronger, for after providing that creditors shall share pro rata, the statute specifically provides "without priority or preference whatsoever." The District Court in the case last referred to in part said:

> "The question therefore is: Does this act modify the rule of the common law? From an examination of the act it will be found to comprise a general, complete, and comprehensive scheme for the conservation and disposition of the estates of those who assign their property for the benefit of creditors and for the distribution of the proceeds of such estates

among all creditors in proportion to their proven demands. That such is the nature and effect of the act is settled by the decisions of the Supreme Court of this state. Hardware Company v. Implement Company, 47 Kan. 423, 28 Pac. 171. While it is the general rule, as contended by counsel for the state, that the rights of the sovereign state remain unaffected by an act unless the sovereign be expressly named therein, yet I am persuaded the necessary and inevitable effect of the act in question was to exclude the sovereign state from demanding that debts owing it by one who makes an assignment in accordance with its provision should receive priority in payment over general creditors of such estates, and that the rule of the common law in this respect, if conceded to be in effect in this state as modified by statute, would not entitle the state to such preferential payment for two reasons: (1) The provision of the act that the assignment 'shall be for the benefit of all creditors of the assignor in proportion to their respective claims' is repugnant to the common-law rule contended for by the state in this case; hence that rule must yield to the statute, not alone from the force of necessity, but from the very language of the act adopting it, not in its entirety, but only in aid of the statutes. (2) Because if it should be held the state in its sovereign capacity succeeded to the common-law rule of the prerogative right of the crown to priority of payment over other creditors, even then the effect of such assignment for the benefit of creditors, as is contemplated by the act, has ever been

held to cut off and destroy the prerogative right of the crown to priority of payment; hence it was necessary to make express mention of the state to reduce its demands against the estate of the assignor to the rank of other creditors. * * * Therefore, laying aside for future decision by the Supreme Court of the state, or other tribunal, the extremely doubtful and difficult question whether this state in its sovereign capacity has succeeded to the prerogative right of the crown to demand priority of payment of its claims out of the estates of insolvent debtors within her borders in the absence of some modifying statutes, but conceding for the purpose of decision of the present matter the fact that the state, in the absence of any statute to the contrary, would succeed to such prerogative right by virtue of the common law, yet in the very form of its adoption the common law obtains in this state, not to its full extent, but only in aid of the statutes, and when not repugnant thereto. Therefore, as the provisions of the act in relation to assignments for the benefit of creditors is the only insolvency law of this state to which resort may be had to determine what persons are entitled under the laws of the state to priority of payment to their demands out of the estate of the bankrupt, and as that act is repugnant to the common-law rule contended for by the state, it must be held the common-law in this respect is modified by statute, and the right of the state to priority of payment of its demands in this case is not found by the laws of the state to be reserved to it and enforceable under the provisions of section 64b of the Bankruptcy Act."

III.

The Statute Involved Here Is Unconstitutional in That It Does Not Afford Due Process of Law.

In the case of *Pauley v. State of California, supra,* it was contended by the appellant therein that the statute involved there did not afford due process of law. This court in its decision stated in part as follows:

> "The text of Act 2964 does not bear out the appellant's assertion. As we have seen, the statute contains elaborate provisions for 'collection of tax if delinquent', 'seizure of property', 'notice of intended sale', 'sale in accordance with law', 'forfeiture of bond or deposit', 'proceedings if tax not paid' with citations of the distributor to appear before the State Board of Equalization, etc."

Each and all of the provisions of the statute thus referred to by this Court in its decision are contained in the 1931 amendments of the statute and were not at all contained in the statute as it existed at the time involved here.

Under the act as it existed at the time involved here there is absolutely no provision for a hearing of any kind except as we will hereinafter indicate. Section 4, which we have already set forth in full, provides that the tax shall be a lien and if not paid by a certain time a 10% penalty shall be added for delinquency. Section 6 provides for a statement to be filed by the distributor and then provides as follows:

> "The State Board of Equalization shall compute the license tax due or to become due hereunder, and extend the same upon a tax-roll prepared and kept for the purpose, and on or before thirty days from

and after the close of each quarterly period as herein defined, shall deliver said tax roll to the state controller, who shall give due notice of the dates when said taxes will become due."

Cal. Stats. 1923, Chapter 267.

Section 9, which we have already set forth in full, provides in effect that if the distributor shall fail to file a report the State Board of Equalization shall determine and fix the amount of the license tax and shall add a penalty of 25% and shall deliver the same to the State Controller who shall proceed to collect the tax and penalty, together with interest at the rate of 7% per annum, and any additional penalty provided for by section 4, and the first paragraph of said section 9 concludes with these words: "and the distributor is thereafter estopped from complaining of the amount thereof".

Section 12, as amended by Cal. Stats. 1927, page 1310, provides that the State Board of Equalization may examine all records of the distributor and that if such examination discloses that any reports have shown incorrectly the amount of gallonage or the amount of tax accruing thereon, "said board shall have the power and is hereby authorized to make such changes in subsequent assessments of said distributors under this act as it may deem necessary to correct the errors disclosed by its examination of the records of said distributor".

Section 14, as amended by Cal. Stats. 1925, page 661, provides certain penalties and concludes with the following:

"The State Board of Equalization shall have power to revoke the license of any distributor refusing or neglecting to comply with the provisions of this act."

The portion of section 14 quoted above indicates to some extent the great difference between the statute involved here and the statute as amended in 1931, involved in the case of *Pauley v. State of California, supra.* The act as amended in 1931, unlike the previous statute which provided for no hearing whatever, provided in section 9 as follows:

> "If the license tax and such penalties as may have been incurred thereon chargeable to any distributor are not fully paid by the delinquent date specified in section 4 of this act, the controller shall notify forthwith the State Board of Equalization, who must cite said distributor to appear within ten days before said board and show cause why his license under section 2 of this act should not be revoked, as prescribed by section 14 hereof."

This latter provision is the one referred to by this Court in its decision in the *Pauley* case as "proceedings if tax not paid".

It thus appears that the act as it existed at the time involved here provided for the assessment by the State Board of Equalization of a tax, and for the revocation of license for non-compliance with the act, all without any hearing for the distributor whatever. Furthermore, under section 9, which we have already quoted and to which we have previously referred, not only may the tax be assessed with penalties and interest, but in the words of the section "and the distributor is thereafter estopped from complaining of the amount thereof".

It is perhaps true that if the distributor elected to do nothing and waited for the attorney general to bring an action at law as provided in section 9, that in such action

the distributor might, under some circumstances, have an opportunity to question the assessment. But in such case the distributor would act at his peril as to the various money penalties provided by the act and as to the criminal penalties. Furthermore, under the circumstances governed by section 9, that section itself provides that the distributor is estopped from complaining of the amount of the tax.

It is true that section 18, at the time involved here provided as follows (italics ours):

> "All matters of *procedure* relating to *refunds* of taxes or the *cancellation of any assessment* levied under the provisions of this act shall be governed by the provisions of section three thousand six hundred sixty-nine of the political code."
>
> *Amendment, Cal. Stats. 1925,* p. 661.

It should be noted that this section only makes section 3669 of the Political Code applicable as to *procedure.* Said section of the Political Code as it existed at the time involved here in so far as procedure is concerned provides in part as follows:

> "* * * the state board of equalization shall certify to the state board of control the amount of such taxes, penalties or costs collected in excess of what was legally due, from whom they were collected or by whom paid, and if approved by said board of control, the same shall be credited to the company or person to whom it rightfully belongs, at the time of the next payment of taxes. No claim for such credit shall be so audited, approved, allowed, or paid unless presented within one year after the payment sought to be refunded.

"4. Cancellation of Assessment. In case the assessment of any property or any company is duplicated * * * or there appears thereon the assessment of any company whose charter has been forfeited * * * or the assessment of any company which * * * could not be legally assessed, the state board of equalization or the controller shall certify such fact to the state board of control and said board of control shall authorize the cancellation of such assessment."

It should be noted that no other sections of the Political Code providing for actions to recover taxes, etc., are made applicable and that section 3669 just referred to itself makes no provision whatever for any hearing of any kind to the taxpayer.

Furthermore, the "refunds" referred to in section 18 are no doubt those refunds referred to and provided for in the statute itself in section 11 as amended by Cal. Stats. 1927, page 1309. These refunds are only refunds relating to fuel not used in motor vehicles, fuel exported outside the state and fuel used for delivery of mails.

We cannot emphasize too strongly the fact that this statute not only makes no provision for a hearing before the board prior to the making of the assessment, but makes no provision whatever for a hearing before the board to protest or contest the assessment after it has been made. Furthermore, the statute makes no provision for a hearing before the board exercises its power to revoke the license. There is no provision for bringing any action to recover any tax paid; and as to certain refunds and cancellations, the statute limits the procedure to that described in section 3669 of the Political Code which it-

self is lacking in any proceeding for a hearing. Under section 9, in the action of law brought by the attorney general, the distributor is expressly estopped by the provisions of section 9 itself from questioning the amount of the tax and penalties previously assessed by the board.

Conclusion.

We urge that for the reasons advanced here this case is not governed by the decision of this Court in the case of *Pauley v. State of California, supra.* The statute involved here not only fails to create an effective lien but the statute itself is unfair and arbitrary to the extent that it withholds from the distributor the requirement of that degree of due process of law which is required even in tax statutes. We further contend that the State of California has no general priority for its claim under the common law for the reason that the common law in this matter does not apply in the State of California.

Respectfully submitted,

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No. 8088.

In the United States Circuit Court of Appeals

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Nora L. Powers and Georgianna R. Judd,

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APPELLEE'S BRIEF.

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other words, if our contention on the cross-appeal as to the tax proper is sustained, then, of course, the claim of the State of California as to the penalty and interest on the tax will likewise fail. This brief is therefore written on the assumption, for the sake of argument only, that the claim of the State of California for the tax proper is valid and was correctly allowed by the lower court.

It is appellee's contention that the lower court properly disallowed the claim for penalty and that the State of California is not entitled to interest on its tax claim, at least until after the principal of all claims has first been paid in full. In fact, it is our contention that there is no right whatever to interest on this tax claim.

I.

The State Is Not Entitled to Allowance of Its Claim for the Penalty Which Accrued After the Appointment of the Receiver on Taxes Assessed and Levied Prior to the Appointment.

The general rule is that the status of a claim against property in the hands of a receiver is fixed as at the time of the appointment of the receiver.

Vol. 1, *Clark on Receivers* (2d Ed.), p. 915.

The receiver herein was appointed on May 8, 1931. The tax involved was for the quarter of the calendar year ending March 31, 1931. No penalty accrued under the statute until May 15, 1931. Therefore, at the time of the appointment of the receiver the only claim which the State of California had, if any, was for the amount of the alleged tax proper.

The question here, therefore, does not involve a tax and penalty both of which had accured at the time of the appointment of the receiver, nor a tax and penalty both of which accrued subsequent to the appointment of the receiver. The question here is as to penalty which it is claimed accrued subsequent to the appointment of the receiver on a tax, however, accrued prior to the appointment.

It should be noted that the tax involved here is not a property tax, but is an excise or privilege tax.

> *Pauley, Receiver, v. State of California,* 75 Fed. (2d) 120.

In view of the apparent weight which appellant attaches to numerous cases cited in its brief, we believe the foregoing points are important. In none of the cases upon which appellant relies do we find that any question was raised or discussed by the court as to the distinction between a penalty accruing subsequent to the appointment of receiver on a prior accrued tax, and a penalty either accrued prior to the appointment or accrued subsequent to the appointment on a subsequent accrued tax.

First National Bank of Houston, Texas, v. Ewing, 103 Fed. 168, cited by appellant, is not in point, and to our mind not of great persuasive force on the question involved here for several reasons. The tax involved was a state and city *property* tax. The dispute was between a person who had purchased the property of the receivership estate and the estate itself. The question was whether, by reason of a decree under which the purchase was made, which provided that the purchaser should take title free from all claims, except certain enumerated ones (not in-

cluding tax liens), the taxes which had become a lien on the property should be paid by the purchaser or by the receivership estate. The court held that the purchaser was entitled to take the property free of tax liens and that, therefore, the receivership estate should pay the taxes, including interest and penalties. It is true that included among the penalties was probably a penalty which accrued subsequent to the receivership on a prior tax. However, most of the taxes involved were taxes which accrued subsequent to the appointment of the receiver and most of the penalties were penalties on such taxes. No one raised the point as to whether the penalty, if any, on the tax accrued prior to the receivership should be treated differently than the other penalties involved, and the case was decided on the broad principles involved without the distinction being raised or considered by the court.

Coy v. Title Guarantee and Trust Co., 220 Fed. 90, cited by appellant is not in point. The same is true of *Coy v. Title Guarantee and Trust Co.*, 212 Fed. 520, cited by appellant. Neither the last mentioned case, which was in the District Court, nor the case on appeal before the Circuit Court of Appeals for the Ninth Circuit in any way involve any penalty accruing on taxes assessed prior to the receivership. In other words, the tax which was involved was a tax (and incidentally a *property* tax) assessed during the receivership, and the penalty allowed was a penalty for nonpayment by the receiver of taxes which had been assessed against him. Incidentally, the court in *Coy v. Title Guarantee and Trust Co.*, 220 Fed. 90, distinguished the case from that of *United States v. Whitridge*, 231 U. S. 144, in which latter case it was held that a receiver was not liable for the *excise* or *privilege* tax therein involved.

Bright v. State of Arkansas, 249 Fed. 950, cited by appellant did involve an annual franchise tax or privilege tax, payable "on or before August 10". The receivers were appointed July 14, 1914, before the tax for that year became payable, and the petition was for order of payment of the franchise taxes for the years 1914 and 1915. It is quite clear that the court treated these taxes as *taxes which accrued during the receivership,* and therefore allowed the penalties because of nonpayment by the receiver. In fact, the court cites the case of *Coy v. Title Guarantee and Trust Co., supra,* and points out on page 952 that it had been held ". . . that courts of equity, operating the property . . . ought to direct the payment by their receivers of such *taxes as would have accrued during the time the receivers were actually operating the property.*" Again on page 952 the court says: "The conclusion is that the receivers . . . should be directed . . . to pay such *taxes as accrue while they are operating the property.*" (The italics are ours.)

Bright v. State of Arkansas, 249 Fed. 953, cited by appellant, involved real *property* taxes, part of which were for the period prior to the receivership, and part of which were for the period subsequent to the appointment of the receiver, and which real property taxes constituted a lien. The court apparently allowed all of the penalties, but the question as to whether there should be a distinction between the penalties on prior accrued taxes and on taxes accruing during the receivership was not raised or discussed by the court.

The case of *Spencer v. Babylon R. R. Co.,* 250 Fed. 24, cited by appellant, involved a rather complicated situation, including restraining orders against the tax authorities.

The taxes originally involved were apparently those for 1910, 1911, 1912, 1913 and 1914. The receiver had been appointed on January 20, 1911, so that most of the taxes involved were assessed during the receivership. Furthermore, it appears to us, after a careful reading of the case, that the taxes for 1910 and 1911 were, in fact, paid by the defendant company as a condition to one of the restraining orders, so that only taxes assessed during the receivership appear to have been actually involved.

The case of *McFarland v. Hurley,* 286 Fed. 365, cited by appellant, would appear to be somewhat in point if the tax there involved actually accrued prior to the receivership and if a penalty was involved. While appellant in its brief states that there was involved a liability for "penalties", it appears that no penalties were involved. The statute did provide for *interest* and attorneys fees, and the court did quote from the cases mentioned by appellant on page 12 of its brief. These cases we have already discussed and distinguished.

The case of *Gray v. Logan Co.,* 54 Pac. 485 (Okla.) cited by appellant is not in point, for the reason that it involved a *property* tax, and for the reason that *both the tax and the penalty* in question *accrued during the receivership.*

The case of *Northern Finance Corp. v. Byrnes,* 5 Fed. (2d) 11, involved the reverse situation. In other words, it involved *taxes and penalties which accrued prior to the appointment of the receiver.*

Board of Commissioners of Sweetwater Co. v. Bernardin, 74 Fed. (2d) 809, in spite of what is said in appellant's brief at page 15, was not treated by the court as involving a "penalty". The statute provided that after a

delinquency the taxes should *"draw interest"* at a certain rate. While it is true that the claim filed (see 74 Fed. (2d) 811) contained various headings, and that one of these was "Interest and Penalties", under this latter heading there were only listed various items of "interest". The court arrived at its decision after setting out rather fully the rules that apply to the payment of *interest* on claims against receivership estates, and in fact many of the cases cited in the footnote to the decision on pages 814 and 815 do not even involve any taxes or penalties on taxes, but do relate to the question of interest on claims.

The distinction which we urge as to a penalty accruing after the appointment of a receiver on a tax assessed and levied prior to the appointment, we believe, is well taken in law and on principle.

It is, of course, well settled that a claimant may assert a claim for whatever is due him at the time of the appointment of a receiver. In the case of taxes, this would, of course, include both taxes and penalties which had accrued at the time of the appointment of the receiver. This was the case in *Northern Finance Corp. v. Byrnes, supra,* cited by appellant, and is true of some of the penalties involved in some of the other cases cited by appellant.

As to taxes and penalties thereon, both accruing after the appointment of the receiver, such taxes and penalties are properly allowed on the theory that they are an expense of administration. This is pointed out in numerous cases, including among others the *Board of Commissioners, Sweetwater Co. v. Bernardin, supra*, cited by appellant. In other words, as we understand the language in the cases to the general effect that a receivership estate

should bear the same tax burdens as are imposed on persons generally, this means that a receiver should not be permitted to use property or carry on a business without paying the usual taxes assessed against other persons using property and carrying on a similar business. For this reason, taxes assessed *during the receivership* are allowed as an expense of administration and penalties on such taxes are similarly allowed, because of the failure of the receiver to pay when due taxes *assessed against him* or assessed on property in his hands during the receivership.

The two cases of *Coy v. Title Guarantee and Trust Co., supra,* and the cases of *Bright v. State of Arkansas,* 249 Fed. 950, *supra,* and *Gray v. Logan Co., supra,* and probably the case of *Spencer v. Babylon R. R. Co., supra,* cited by appellant, involved such taxes and penalties, *both* accruing *during the receivership.* Most, at least, of the taxes involved in the case of *First National Bank of Houston, Texas v. Ewing, supra,* and part of the taxes involved in *Bright v. State of Arkansas,* 249 Fed. 953, *supra,* and most, if not all, of the taxes involved in the case of *Spencer v. Babylon R. R. Co., supra,* were taxes assessed *during the receivership,* and therefore involved penalties on such taxes.

As we have pointed out, the tax involved here is an excise, privilege or occupation tax. While some cases, including the case of *United States v. Whitridge, supra,* have held that a receiver is not liable for such taxes accruing during the receivership, we do not find it necessary to make any such contention here. In fact, the receiver has been paying the tax assessed and levied during the receivership on distribution of motor fuel made by the re-

ceiver during the receivership. What we do contend is that the receivership estate should not be burdened with the penalty on this privilege or occupation tax, which penalty had not accrued at the time of the appointment of the receiver. Such a penalty cannot by any stretch of the imagination be considered an expense of administration, for it in no way relates to the business being carried on by the receiver; nor is it a property tax on any property being used by the receiver in carrying on the business. The tax proper was assessed and levied for the privilege, exercised and enjoyed by the defendant corporation, of distributing motor fuel prior to the receivership.

Appellant in its brief states that the general rule is that a penalty is a part of the taxes. We find that the jurisdictions are divided on this question, and while it is held in some jurisdictions as contended by appellant, in others it has been held that the penalty is not a part of the taxes but is merely a method of enforcing its payment (61 C. J. p. 1485). We submit that the latter view is more strictly in accord with the actual purpose of a penalty.

The case of *McCormick v. Puritan Coal & Mining Co., Inc.*, 41 Fed. (2d) 213, which appellant cites as supporting our contention did not base its decision entirely on the two cases of *Coy v. Title Guarantee and Trust Co.*, and *Thomas v. Western Car Co.*, referred to on page 17 of appellant's brief, but cited numerous other cases in support of its decision. We are frank to say, however, that even in the case of *McCormick v. Puritan Coal & Mining Co.*,

Inc., supra, the court did not discuss or consider the particular distinction which we advance here. In fact, so far as we are aware, in no case cited by appellant, or in any other case which we have been able to find, has the particular status of a penalty on a privilege or occupation tax, such as the one involved here, which penalty accrued after the appointment of the receiver on a tax accrued prior to the appointment of the receiver, been consciously considered by the court.

A *property tax* is not involved here, but we are ready to concede that there is probably a sound basis in the matter of property taxes for permitting penalties (even on prior accrued taxes) to be recovered from the receivership estate. In fact, most of the cases cited by appellant involve property taxes. The basis for allowing such penalties on property taxes would appear to us to lie in the fact that the tax is a direct tax *on property* and where the property which is the subject of such tax, and the lien imposed by such tax, is still in the hands of the receivership estate, that mere fact should not deprive the local tax authorities of their right to look to the property for the tax and penalty imposed on such property. It would be otherwise we think, however, if the property involved did not pass into the hands of the receiver. In other words, if a corporation had disposed, for instance, of its real property before the appointment of a receiver for such corporation, and without having paid the taxes on such property, then we doubt whether the receivership estate should be looked to for any penalty on such unpaid

taxes, if in fact the receivership estate could be looked to for the payment of the taxes at all.

We submit that the rule should be sustantially as follows: That as to valid taxes and the penalties thereon, both accrued prior to receivership, these should be allowed as a valid claim existing at the time of the appointment of the receiver; that as to taxes accrued during the receivership and the penalties thereon for nonpayment by the receiver, these should be allowed in proper cases as an expense of administration; that in the case of a privilege or occupation tax, such as that involved here, any valid tax accrued prior to the appointment of receiver and penalty thereon accrued prior to appointment of receiver should be allowed as a valid claim existing at the time of the appointment of the receiver, but that any penalty for nonpayment of such privilege or occupation tax which penalty had not accrued at the time of the appointment of the receiver should not be allowed either as a claim existing at the time of appointment or as an expense of administration or otherwise. As to a property tax, such property should, perhaps, be subject generally to whatever tax burdens, including penalties, are imposed on such property, regardless of such property coming into or being in the hands of a receiver.

We most earnestly contend that this receivership should not be burdened with a penalty which had not accrued at the time of the appointment of receiver on a tax levied for a privilege exercised and an occupation carried on by the defendant corporation prior to receivership.

II.

The State Is Not Entitled to Receive Interest on Its Tax Claim, and There Was, Therefore, No Error Prejudicial to the State in the Holding of the Lower Court That the State Is Not Entitled to Interest Unless and Until All Creditors Are Paid in Full and There Is an Excess of Assets From Which Interest Payments May Be Made.

Appellant states, in effect, that the District Court treated the tax claim as being a claim of interest bearing quality. While the lower court did not expressly order that the State should receive interest at all, the lower court did order that the State should not receive interest unless and until all creditors were first paid in full. Perhaps, by implication, that amounts to an order, that after all creditors are paid in full the State should receive interest on its claim. If so, we believe that the lower court was in error, but that error is not prejudicial to the State. In other words, we do not believe the State is entitled to receive any interest whatever on this claim.

In the first place, the claim [Tr. pp. 5 *et seq.*] did not ask for any interest. The claim was for principal and penalty only. The same thing is true of petition for order to show cause [Tr. pp. 9-10], and the order to show cause [Tr. pp. 11-12]. In the second place, it is our contention that the statute involved (chapter 267 Cal. Stats. 1923, as amended) did not provide for any interest on this tax, and therefore, as a matter of law, the State is not entitled to any interest.

It must be remembered that we are dealing with the statute as it existed prior to the 1931 amendments. Section 4 of the act provided for the 10% penalty, but did not

provide for any interest. That part of section 4 which is material is as follows:

> ". . . The amount of such license tax becoming due during each such quarter shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock P. M. on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency."
>
> Cal. Stats. 1925, p. 659.

Section 9 of the act does provide that if the distributor shall fail, neglect or refuse *to file the reports,* the State Board shall make a statement and determine and fix the amount of the tax and

> "shall add to the amount of such license tax a penalty of twenty-five per cent thereof, and shall deliver such statement to the State Controller who shall proceed to collect the amount of such license tax with the penalty added thereto, together with interest on the whole thereof at the rate of seven per cent per annum *from the date upon which such statement should have been filed,* together with any penalty *for delinquent payment* that may have accrued by reason of section 4 of this act. . . .".
>
> Cal. Stats. 1929, p. 113.

A clear distinction is thus made between the case of delinquent payment and the case of the failure of the distributor to file the statement. We are not concerned here with the situation covered by section 9 involving the failure of the distributor to file the necessary statement or report. We are concerned here only with the question of delinquent payment, and the sole provision in the act relat-

ing thereto is for the ten per cent penalty, for which the State filed its claim. In other words, it is our contention that the statute only provides for interest where the statement has not been filed by the distributor, and in that case the interest runs "from the date upon which such statement should have been filed."

While it has been held by the United States Supreme Court that, independently of statute, interest as a penalty is recoverable on taxes due the United States, the State Courts, on the other hand, have held that interest is not recoverable on delinquent taxes due the State, or a political subdivision thereof, *unless it is expressly so provided by statute.*

61 *C. J.* p. 1515.

This is the rule in California and elsewhere.

People v. Cent. R. R. Co., 105 Cal. 576;

People v. M. P. C. R. R. Co., 68 Cal. 551;

Lake County v. S. B. Q. M. Co., 66 Cal. 17;

People v. Gold etc Tel. Co., 98 N. Y. 67;

Knudtson v. Citiz. etc. Bank (S. D.), 251 N. W. 810;

Dougherty v. McAlpine, 1 Cal. (unrep.) 370;

Commonwealth v. Walker, 246 Ky. 679; 55 S. W. (2d) 914.

Numerous other cases are cited in the note to the article in 61 C. J., at page 1515, referred to *supra.* In some of these cases it is also pointed out that the fact that the statute imposes a penalty for delinquency excludes the idea that the taxpayer is liable for interest in addition to the penalty.

In *People v. Cent. Pac. R. R. Co., supra,* the court said on pages 594-595:

> "The court erred in allowing plaintiff interest on the amount of the taxes. Section 3668 of the Political Code provides that, if the taxes are not paid on the last Monday in December in each year, five per cent shall be added to the principal sum and paid by the delinquent. This is the only penalty given by the statute, but the court has included in its judgment not only this penalty, but also interest upon the principal sum from the date of the delinquency at seven per cent per annum. Taxes do not bear interest unless it is expressly given by statute (Cooley on Taxation, 2d ed., 17); and the provision in section 3803 for interest upon a certain class of taxes is indicative of an intention upon the part of the legislature to exclude all other classes."

In the case of *People v. M. P. C. R. R. Co., supra,* the court said on pages 553-554:

> "In all of these provisions, as is seen, nothing is said about interest, and it is not claimed for appellant that they authorize the collection of interest. But it is urged that under section 3803 of the same code, interest at the rate of two per cent per month on certain delinquent taxes may be collected, and that section should be construed to apply to taxes such as are sued for in this action.
>
> "We are satisfied that the section cannot be so construed. It refers only to the delinquent taxes mentioned in the sections immediately preceding it, and has no application to other taxes than those so mentioned. (Harper v. Rowe, 53 Cal. 236; Lake County v. Sulphur Bank Q. M. Co., 66 Cal. 17.)

> "If it had been intended that interest should be collected on all taxes which the controller might sue for 'and recover, the complaint, formulated by the legislature for their collection, would, in our opinion, have demanded judgment for that interest, as well as for the 'five per cent for non-payment'."

In the case of *Perry v. Washburn,* 20 Cal. 318, court said at page 350:

> "A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the taxpayer and State; *it does not draw interest;* it is not the subject of judgment; and it is not liable to set-off."

In the case of *Dougherty v. McAlpine, supra,* the court said on page 370:

> "Taxes do not draw interest, unless there is some special statutory provision authorizing it: Perry v. Washburn, 20 Cal. 350. There is no difference in this respect between general taxation, and that species of public burdens or taxes known by the name assessments. They are not embraced in the terms of the general statute of this state upon the subject of interest. Our attention has not been called to any provisions requiring the payment of interest. The judgment is, therefore, erroneous in giving interest and must in this particular be modified."

Since the statute involved here does not provide for interest in the case of mere delinquency of payment, the

State is not entitled to interest on its claim for this tax. Certainly it can recover no more under its claim against the receivership estate than it could recover from the taxpayer. Furthermore, as we have already pointed out, the State did not present its claim as an interest bearing claim.

We also point out that in addition to the fact that the claim was not presented as an interest bearing claim, the appellant permitted more than four years to elapse before pressing its claim. In other words, although a claim was filed in May, 1931, for the tax proper and the penalty [Tr. pp. 5-8], and was disallowed both by the receiver and the court as to the penalty in August, 1931 [Tr. p. 15], the State of California took no steps to press its claim until it filed its petition for order to show cause in July, 1935 [Tr. pp. 9-10]. Even at that time, the State of California did not ask by its petition for interest. We submit that the receivership estate should not be burdened with this several years' accrual of interest, under the circumstances.

Conclusion.

We urge that those portions of the order of the District Court from which the State of California has taken its appeal be affirmed and that in affirming its order this court interpret said order as not providing for the payment of any interest whatever, even after other creditors are paid.

Respectfully submitted,

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Attorneys for Appellee.

No. 8088

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

IN AND FOR THE

NINTH CIRCUIT

NORA L. POWERS and GEORGIANA R. JUDD,
Complainants,

vs.

LAKE VIEW OIL AND REFINING COMPANY, a corporation,
Defendant.

STATE OF CALIFORNIA,
Appellant and Cross-Appellee,

vs.

PAUL J. HISEY, as RECEIVER OF LAKE VIEW OIL AND REFINING COMPANY, a corporation,
Appellee and Cross-Appellant.

CROSS-APPELLEE'S BRIEF

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TOPICAL INDEX

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CROSS-APPELLEE'S BRIEF

The facts involved in this appeal have been previously stated both in the cross-appellant's brief and in the appellant's brief herein. In this cross-appeal the receiver contends, in effect, that the entire statute upon which the tax claim of the state is based is unconstitutional in that it does not afford due process of law. Apparently from this contention the cross-appellant would have the court conclude that the claim of the state is in-

valid in its entirety and should not have been allowed at all, though this is not positively stated in the cross-appellant's brief. Secondly, he contends that, in any event, the claim of the state is not entitled to any priority by reason of any rule of the common law granting a priority to the sovereign. Finally, he contends that neither is the state entitled to any priority by reason of its claim being a lien. In other words, it is his position that the statute herein failed to provide a remedy for the enforcement of the lien which it purports to create and that, therefore, said purported lien is in reality of no effect.

The cross-appellant has discussed these points in the reverse order from that above set forth. We shall therefore consider them in the same order in which he has presented them.

POINT I

THE LIEN CREATED BY THE CALIFORNIA MOTOR VEHICLE FUEL TAX ACT IS VALID AND MUST BE RECOGNIZED IN THIS RECEIVERSHIP PROCEEDING

The tax for which the state's claim was filed herein, was for distribution of motor vehicle fuel in the State of California during the first quarter of the year 1931, pursuant to the provisions of the California Motor Vehicle Fuel License Tax Act. (Stats. 1923, p. 571, as amended.) Said statute, as it existed during said first quarter and until March

30, 1931 (see Calif. Statutes 1931, p. 109), is set forth in full in the appendix to this brief.

During the times involved herein, section 4 of said act, after specifying when the tax should be paid, provided that

> "Said tax shall be a lien upon all the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof."
>
> Calif. Stats. 1925, p. 659, sec. 4.

The cross-appellant concedes, as he must, the existence of this provision, but contends that there was no remedy provided by the statute for the enforcement of said lien and that, therefore, the above quoted provision is of no effect in its attempt to create a lien.

He points out that the provisions of section 4, as amended in 1931 (Calif. Stats. 1931, p. 109), setting forth a procedure for the enforcement of said lien and collection of said tax by seizure and sale of certain property of the distributor by the Controller, were no part of the tax law at the time the tax involved herein accrued. He further points out that the case of *Pauley* vs. *State of California*, 75 Fed. (2d) 120, involved motor vehicle fuel taxes levied pursuant to the 1931 amendment to said California Motor Vehicle Fuel Tax Act. (Cross-appellant's brief, pp. 5–7.) He then states

that "while the statute at the time involved here did not provide a method for enforcing the purported lien, the act did provide a procedure, and only one procedure, for collecting the tax," which procedure must be exclusive, *because,* "where the statute provides a mode for the collection of the tax that is the only mode available." (Cross-appellant's brief, pp. 9, 10.) The method for collection provided by the statute, and referred to by said cross-appellant is found in section 9 of the Tax Act. It provides:

> "Upon the request of the State Controller, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued."

The cross-appellee concedes that *if* a statutory method were provided *for the enforcement of the lien,* that method would be the only one available in the absence of express or implied provision in the statute to the contrary. This is the effect, and the *only* effect, of the decisions in *Boskowitz* vs. *Thompson*, 144 Cal. 724, and *Page* vs. *W. W. Chase Co.*, 145 Cal. 578, cited by the cross-appellant in his brief at pages 10 and 11. Here, however, the cross-appellant, while contending in one breath that the statute has not provided *any* method for the enforcement of the lien, contends in the next breath that the provision for the collection of the tax by an action by

the Attorney General is the exclusive method for *enforcing the lien.* If the statute provides no method for enforcing the lien it certainly can not be said that, merely by providing a method for collecting the tax the legislature intended that there should be no method for enforcing the lien which they have by express terms established. In order to bring this case within the principle stated by *Boskowitz* vs. *Thompson, supra,* it must be assumed that the action which the statute provides shall be commenced by the Attorney General is an action to enforce the lien. Otherwise, the action provided for by the statute does not preclude any enforcement of the lien.

In any event, however, the principle stated in the cases cited is merely a rule for determining the legislative intention. It has no application when the statute itself clearly discloses that it is the intention of the legislature that the statutory remedy should not be exclusive. In this regard, the history of the statute here in question conclusively shows that the legislature did *not* intend that said provision for an action by the Attorney General should preclude the use of any available remedy for the enforcement of the lien which said statute specifies shall exist. Said section 9, providing for an action by the Attorney General, was a part of the statute as originally enacted in 1923 (Calif. Stats. 1923, p. 571, Sec. 9), although said original statute did not contain any provision for a *lien* for said taxes. Then, in 1925, the legislature modified section 4 of

the original act by adding the provisions heretofore quoted, creating such a lien. (Calif. Stats. 1925, p. 659, Sec. 4.) It is true that the legislature did not specifically provide any statutory remedy for the enforcement of said lien. And said section 9 was left unaltered. But it would be unreasonable to say that the legislature intended to perform a futile act in thus carefully and deliberately providing for a lien.

Clearly, the only reasonable construction is that the legislature intended the lien to be enforced by such means as are available in the *absence* of any statutory provision for its enforcement. This is entirely consistent with the provisions of said section 9 authorizing the Attorney General to commence an action at law for the collection of the tax: there is nothing in said section which, either expressly or by necessary implication precludes any action in equity to enforce the lien. Of course, as the act read when originally enacted, the action at law was the only kind of relief that could have been sought by an action to collect the taxes, because no lien existed under said act. However, having created the lien, in 1925, it would be unreasonable to say that the legislature intended said section 9 to preclude any remedy which would otherwise be available, for enforcing the lien.

In other words, the most that can be said in the cross-appellant's favor is that the statute failed to specifically provide for any means of enforcing the

lien created by the 1925 amendment. But this alone would not preclude an action in *equity* to foreclose the lien. Equity will always enforce liens, both statutory and otherwise, where there is no remedy at law for their enforcement.

In *Hibernia Savings & Loan Society* vs. *London, etc., Ins. Co.,* 138 Cal. 257, the court said at page 259:

> "The enforcement of liens, whether equitable or statutory, is a well-recognized function of courts of equity; and the only distinction in this respect between the different kinds of liens is, that in the case of the latter equity will interpose only where there is no other adequate remedy. (1 Pomeroy's Equity Jurisprudence, secs. 167, 112 (class 4), 171, 297, and note 2; 3 Pomeroy's Equity Jurisprudence, secs. 1268-1269, p. 1415, n. p. 2185; *Lockett* v. *Robinson,* 31 Fla. 134; Witmer's Appeal, 45 Pa. St. 455; *Gilchrist* v. *Helena etc. R. R. Co.,* 58 Fed. 711); to which may be added the case of *Morton* v. *Adams,* 124 Cal. 229."

See also:

Proctor vs. *Arakelian,* 208 Cal. 82, 98;
Everett vs. *Hayes,* 94 Cal. App. 31, 34.

For general statements of this principle see: 16 Cal. Jur. 353, "Liens," section 52; and 37 C. J. 340, "Liens," section 65.

As has been stated, there is nothing in section 9 of the act here involved which would require a different conclusion. An action to foreclose the lien is entirely consistent with the provisions of

said section. The only interpretation of the statute which is reasonable, in the light of the manifest intention of the legislature, is that any action might be brought for the enforcement of the lien created by the 1925 amendment, which would be available for this purpose in the *absence* of said section 9.

It is therefore submitted that the lien here in question was *not* without a remedy for its enforcement. The cross-appellant's entire argument as to the validity of the lien is based upon the assumption that there was no remedy for the enforcement of said lien. This premise being false, his conclusion must, of course, fall with the false premise.

However, having convinced himself that there was not, at the time involved herein, any remedy for the enforcement of the lien which the statute created, the cross-appellant then proceeds with the contention that when there is no right to *enforce* the lien for taxes such a lien does not *exist.* (Cross-appellant's brief, pp. 11–13.) In support of this proposition he cites the cases of *Clark* vs. *City of San Diego,* 144 Cal. 361; *Chambers* vs. *Gibson,* 178 Cal. 416; and *City of San Diego* vs. *Higgins,* 115 Cal. 170.

These cases, he says, establish the rule in California that when the remedy for the enforcement of a lien is barred by the statute of limitations, the lien ceases to exist. It is submitted that even if this were the rule, it would not necessarily follow that, when no remedy for the enforcement of a

statutory lien is provided in the first instance by said statute, the statute fails in its attempt to create the lien. For in the case of the operation of the statute of limitations, the *equitable* remedy for the enforcement of the lien is barred, along with any other remedy for its enforcement. In the case of the failure to provide a remedy for its enforcement in the first place, however, there is nothing to prevent *equity* from enforcing the lien in accordance with the principle heretofore stated. However, it is not necessary to argue this proposition at length, for it is submitted that it is *not the rule* in California that a lien *ceases to exist* even when the remedy which is provided for its enforcement is barred by the statute of limitations. It is believed that a consideration of the California cases, including those cited by the cross-appellant, will support the cross-appellee in this contention.

Chambers vs. *Gibson, supra,* the latest case of those cited by the cross-appellant, merely holds that a personal action to collect a tax is barred by the three-year period of limitations prescribed by subdivision 1 of section 338 of the California Code of Civil Procedure, notwithstanding such tax is secured by a lien. There is nothing in this case to the effect that when the statute of limitations bars any remedy for the enforcement of the lien, the lien *ceases to exist.*

In *City of San Diego* vs. *Higgins, supra,* also cited by the cross-appellant, the court merely held

that an action to foreclose a tax lien is *barred* by the same period of limitations which bars an action to collect the tax. In fact, the court specifically recognizes that a lien *may exist* without provision for its enforcement. (See 115 Cal. 170, 172.)

The case of *Clark* vs. *City of San Diego,* quoted at length in the cross-appellant's brief at page 12, does hold that the owner of property may, after the right of action for the collection of taxes is lost under the statute of limitations, quiet his title against any lien for said taxes. It is submitted however, that, insofar as this case may hold that the statute of limitations in California operates to *extinguish* a lien rather than merely to bar the enforcement of the lien, it has been overruled by subsequent cases. In other words, it is *not* the law in this state, that "When the right of action is lost, as by the running of the statute of limitations, the lien ceases to exist." (Cross-appellee's brief, p. 11.) This is at once apparent upon a consideration of the cases upon this point at about the time when the decision in *Clark* vs. *City of San Diego* was rendered.

In 1904, in *Mutual Life Ins. Co.* vs. *Pacific Fruit Co.,* 142 Cal. 477, in an opinion by Justice Henshaw, concurred in by Justices McFarland, Lorigan and Van Dyke, it was held that the lien of a pledge as security was *extinguished* by the statute of limitations. This was said to result from the provisions of California Civil Code, section 2911. This section provides that:

"A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

Also, in 1904, the case of *Clark* vs. *City of San Diego, supra,* cited by the cross-appellant, was decided, the opinion again being by Justice Henshaw and concurred in by Justices McFarland and Lorigan. A hearing en banc was denied. This decision was based upon a similar interpretation of said section 2911 and upon the authority of earlier cases placing a like construction thereupon.

In 1907, however, in the case of *Puckhaber* vs. *Henry,* 152 Cal. 419, the court repudiated this interpretation of said section, and expressly overruled the case of *Mutual Life Ins. Co.* vs. *Pacific Fruit Co., supra,* 142 Cal. 477. The opinion was written by Justice Angellotti. It is particularly worthy of note that the aforesaid Justices Henshaw, McFarland and Lorigan dissented. However, this later interpretation of said section 2911 is now the law in California. In other words, as is said in *Puckhaber* vs. *Henry, supra,* 152 Cal. 419, 422–423:

"Section 2911, adopted as a part of the original code in 1872, was designed simply to declare the rule previously laid down by the decisions of this court, to the effect that when an action upon the indebtedness is barred by the statute of limitations, action on any contract given by way of security for the debt is also barred. * * * The effect of the California rule is undoubtedly to prevent any affirmative action on the part of

> the mortgagee or pledgee to enforce his lien, after the debt is barred by the statute of limitations. In such a case, the lien no longer exists. It has been 'extinguished.' But the section was not designed to prevent the application of the equitable principle which has always been recognized as warranting courts in refusing to aid the debtor in the recovery of possession of his property from the mortgagee in possession or pledgee, or in removing any cloud upon his title created by an instrument in writing given as security, without payment of his debt."

Therefore, even assuming that the situation where the remedy for the enforcement of a lien is barred by reason of the period of limitations is analogous to the situation here, where no remedy for the enforcement of the lien was ever provided by the statute, in *neither* case does it result from this lack of remedy that *there is no lien.* It is the law in California, as elsewhere, that a lien *may exist* without there being any remedy for its enforcement.

Of course, as has already been pointed out, there is, in any event, a remedy for the enforcement of the lien here in question, by the usual equitable proceeding. It is therefore submitted that, even upon the cross-appellant's own theory, the lien which the legislature expressly created, does in fact exist, and must be recognized in these receivership proceedings. The court below therefore properly ruled that the claim of the state for taxes was entitled to priority as a tax lien claim.

POINT II

THE STATE'S CLAIM IS ENTITLED TO PRIORITY BY REASON OF THE RULE OF THE COMMON LAW GRANTING SUCH PRIORITY TO THE SOVEREIGN

The second proposition of the cross-appellant (see cross-appellant's brief, pp. 14 to 18) is material only if his first point is sustained by the court. In other words, if the court determines that the state's claim does in fact constitute a lien and is entitled to the priority accorded such lien, then, of course, the question of whether the state's claim is entitled to priority by reason of the common-law rule granting priority to the sovereign, is immaterial. Conversely, however, even if the tax claim does not constitute a lien, it is nevertheless entitled to priority herein if the common-law rule granting priority to the sovereign applies in California.

At the outset the cross-appellant recognizes that this court, in the case of *Pauley* vs. *State of California, supra,* "referred to a priority existing as to debts due to the sovereign." (Cross-appellant's brief, p. 14.) "However," he says, "we feel that the decision as to priority was based upon the holding of the court that there was a lien for the taxes" (referring to the last paragraph in the opinion in said case). It is true that in said paragraph of recapitulation the court does not again mention the *common-law* priority. However, the entire last page (and more) of the report of said opinion in 75 Fed. 2d, except said concluding paragraph, was devoted

to a consideration of the proposition asserted by the State of California that, by its adoption of the common law, said state has succeeded to the prerogative right of the British Crown to priority in payment of taxes out of the assets of insolvent debtors as against all person not having antecedent liens. After considering the case of *Marshall* vs. *New York,* 254 U. S. 380, 382 to 385, 41 Sup. Ct. 143 at 144, 65 L. Ed. 315, the court said, of the then appellant's attempt to distinguish said case:

> "A study of the California Statutes and of the *California Loan Case, supra,* however, will convince one that the appellant is in error, and that the law of California clearly recognizes the priority of the State's liens for taxes." (75 Fed. 2d, 120 at 134.)

Clearly, the court in the *Pauley* case carefully considered the matter and determined positively that the State of California is entitled to the priority accorded to the sovereign at common law. The mere fact that the court did not reiterate this principle in its concluding paragraph does not, of course, mean that said principle was not one of the bases for the decision.

Despite this decision, however, the cross-appellant asserts that the common-law rule of priority of the claims of the state does not exist in California "by reason of the fact that there are statutes which are inconsistent with such rule of the common law." (Cross-appellant's brief, p. 14.) Continuing, the cross-appellant states:

"We are frank to state that the argument which we are now advancing is in part taken from the brief submitted to this Court in the matter of *Laugharn, as Trustee in Bankruptcy* v. *State of California,* in which a memorandum decision was rendered by this Court as reported in 77 Fed. (2d) 1005. However, the last mentioned case was a proceeding in bankruptcy, and involved, therefore, express preferences as to taxes, provided for under section 64a of the Bankruptcy Act. The proceeding here is one in an Equity Receivership." (Cross-Appellant's brief, pp. 14, 15.)

Apparently the cross-appellant has misconceived the argument which was presented in the cited case. There, the argument with regard to the effect of certain statutes upon the common-law rule granting such priority was considered, not in connection with the preference provided for under section 64a of the Bankruptcy Act, but in connection with the proposition that, assuming that the claim there involved was *not* a tax claim entitled to priority under said section 64a, it was nevertheless entitled to priority under the provisions of section 64b, subdivision 7 of the Bankruptcy Act. Said section and subdivision provided that:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * *

"(7) debts owing to any person who by the

laws of the States or the United States is entitled to priority. * * *"

(Bankruptcy Act, Sec. 64b (7), as amended May 27, 1926, c. 406, Sec. 15, 44 Stat. 666; 11 U. S. C. A., Sec. 104b (7).)

The appellant in the *Laugharn* case, the trustee in bankruptcy, argued that the claim there involved was not entitled to priority under section 64a of the Bankruptcy Act, because it was *not a tax* upon the bankrupt, and, further, that, neither was it entitled to priority under the provisions of said section 64b, subdivision (7), of the Bankruptcy Act, because the *"debt"* was not one which, by the laws of the State of California, was entitled to priority. Said appellant conceded that, in the absence of any statute to the contrary, the common-law rule would, of course, apply in California. He contended, however, the same as the cross-appellant herein contends, that certain general insolvency laws passed by the legislature of the State of California (Calif. Stats. 1852, p. 9; Calif. Stats. 1880, p. 82; Calif. Stats. 1895, p. 143) were repugnant to and inconsistent with, and, therefore, prevailed over, said common-law rule of priority. The cross-appellant herein particularly relies (as did the appellant in said *Laugharn* case) on section 35 of said 1895 act, whereby it was provided that:

"All creditors whose debts are duly proved and allowed shall be entitled to share in the property and estate pro-rata, without priority

> or preference whatever, other than as provided in this Act and in Section 1204 of the Code of Civil Procedure."

From this section, and from the fact that said section 1204 of the Code of Civil Procedure does not specifically give any priority to the state, they then conclude that the state does not have such priority, and therefore, that the common-law rule does not prevail.

It is submitted, however, that said statutes do not prescribe a different rule in California than that of the common law. The statutes make no mention whatsoever of the State of California or of any other political subdivision. It is too well settled to require extensive citation of authority, that statutes which would operate to trench upon the state's sovereign rights do not bind the state, unless such intention is manifested by express terms or by clear and necessary implication. (See 23 Cal. Jur. 625, "Statutes," section 24.) Clearly, in the absence of any mention whatsoever of the State of California, or of any of its political subdivisions, it certainly can not be said that it was the intention of the legislature, in adopting said insolvency act, to in effect repeal the common-law rule applicable in this state that the government is entitled to be preferred over other creditors, in the payment of its taxes.

In support of his contrary position, the cross-appellant relies exclusively upon the case of *In re*

Devlin, 180 Fed. 170. (Cross-appellant's brief, pp. 16–18.) Said case was decided by the district court of Kansas, First Division, in 1910. It is submitted that the decision in that case is unsound, and should not be followed by this court. Said decision was carefully analyzed at pages 33 to 36 of the brief of appellee in the case of *Laugharn* vs. *State of California, supra,* in which case the court did not accept the contentions of the then appellant, based upon said *In re Devlin, supra.*

A far more sound interpretation of a similar insolvency law is found in the case of *Commonwealth of Pennsylvania* vs. *Stocker,* 70 Fed. (2d) 453 (3d C. C. A. 1934.) In that case the State of Pennsylvania filed its claim in a bankruptcy proceeding for a debt owing to it, asserting priority of a sovereign in payment over other creditors. The trustee argued that "the commonwealth has waived the priority, which theretofore it had acquired under the common law, *by its legislative declaration of preferences in the settlement of an insolvent estate in which it omitted any preference of its own.*" (Italics ours.) The Pennsylvania statutes in question establish complete rules relating to insolvency practice in said state, providing for certain specific priorities. No mention is made of claims of the state, either for taxes or ordinary debts. (Purdon's Pa. Stats. Ann., Title 39.) Therefore, the court, after stating that "cases generally, and cases in Pennsylvania itself, are strong to the effect that a state can not be deprived

of its rights of a sovereign by inference, that it must be manifested 'by explicit terms' and 'by appropriate constitutional or legislative action'," rejected the contrary contention of the trustee, saying, "We can not find any legislative pronouncement, equivocal or otherwise, or any situation or circumstance in the insolvency laws of Pennsylvania which suggest the commonwealth has surrendered its sovereign right of priority in the payment of its debts over its citizens, nor can we find an implication—certainly not a 'necessary and irresistible' one—that such was its intent and purpose." (70 Fed. (2d) 453 at 454.) In other words, it was held that the Pennsylvania statutes *did not,* by mere failure to specify any preference in behalf of the state, do away with its common-law right to preference. This construction is sound and is the only one which should be applied in the principal case.

It is submitted that the common-law priority of the sovereign has not been repealed in California. Therefore, even if the tax were not a lien, entitled to priority as such, it would nevertheless be entitled to priority herein under said common-law rule.

POINT III

THE STATUTE INVOLVED HEREIN IS NOT UNCONSTITUTIONAL IN THAT IT DOES NOT AFFORD DUE PROCESS OF LAW

The third and final point of the cross-appellant is that the statute involved herein is unconstitutional

because it does not afford due process of law. The decision in *Pauley* vs. *State of California, supra,* is again distinguished upon the ground that the statute which was there involved was the California Motor Vehicle Fuel License Tax Act as amended in 1931, whereas the act which is here involved is said law prior to the 1931 amendment. It is true that the "elaborate provisions" for the collection of said tax referred to by the court in said case (75 Fed. 2d, 120 at 130), in rejecting the argument therein presented that said 1931 statute did not afford due process of law, were not a part of the statute as it existed at the times involved herein. However, as will be pointed out, there were other provisions which afforded due process in an even more adequate manner.

The following is the tax process as provided by said Motor Vehicle Fuel License Tax Act as it existed in the first quarter of 1931, prior to the 1931 amendment: (See Appendix hereto for complete act and for statutory references for each section.) Section 1 of said act contained certain definitions of the terms used in the act. Section 2 provided for the licensing of distributors as defined in said act. Section 3 provided that every distributor should "pay a license tax to the State Controller of this state of two cents * for each gallon of motor

* There is an additional tax of one cent on the distribution of each gallon of fuel, imposed by Chapter 795, California Statutes of 1927, which adopts by reference the provisions of the "two cent" act. (Statutes 1927, p. 1565.)

vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state * * *."

Section 6 of said act provided that each distributor shall, within twenty days after each quarter year commencing with the quarter ending December 31, 1923, file with the State Board of Equalization "a verified statement showing the total number of gallons of motor vehicle fuel refined, manufactured, or compounded by such distributor within this state and sold during such quarter by such distributor within this state," and further provided that

> "The state board of equalization shall compute the license tax due or to become due hereunder, and extend the same upon a tax roll prepared and kept for the purpose, and on or before thirty days from and after the close of each quarterly period as herein defined, shall deliver said tax roll to the state controller, who shall give due notice of the dates when said taxes will become due."

Section 4 of said act, in addition to providing that said tax should become a lien, as heretofore considered, required the distributor to pay to the State Controller the license taxes thus assessed, in quarterly installments,

> "within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock p. m. on the forty-fifth day after the end

> of such quarter, and ten per cent penalty shall be added thereto for delinquency."

There were no provisions for the collection of said tax by seizure and sale of any property of the distributor. As the cross-appellant has mentioned, such provisions were first added to the act in 1931. In fact, the only express provision for the collection of said tax at the time the tax herein accrued, was the provision in section 9 that

> "Upon the request of the state controller, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued."

Clearly, under this section, the distributor as defendant in such an action would be accorded full opportunity to present any valid defense which he might have. Similarly, if an action were commenced to foreclose the state's lien, under the implied authority to bring such an action as heretofore discussed, the distributor would likewise have full opportunity to contest the validity of the assessment either in its entirety or as to its amount, or present any other valid defense he might have. See *Mammina* vs. *Alexander Auto Service Co. et al.,* 164 N. E. 173 (Ill.), 61 A. L. R. 649, holding that equity will enforce a statutory lien when no action therefor is specifically provided in the statute and holding further that *because* the lien must be enforced in

equity (there being no other remedy for the enforcement thereof), this constitutes due process even in *other* than *tax* matters.

As was stated by this court in the case of *Pauley* vs. *State of California, supra,* "It is fundamental law that 'due process' in tax matters does not mean 'judicial process.'" (75 Fed (2d) 120 at 131.) Therefore, by providing, in effect, that payment of the tax here in question could be enforced *only by an action,* either at law, as specifically mentioned in the act, or in equity, as implied by the statutory provisions for a lien, the statute in fact provides even more than due process.

Nevertheless, the cross-appellant insists that the statute failed to grant due process, first, because it "makes no provision for a hearing before the board prior to the making of the assessment"; secondly, because it "makes no provision whatever for a hearing before the board to protest or contest the assessment after it has been made," and finally, because the statute "makes no provision for a hearing, before the board exercises its power to revoke the license" of the distributor. (See cross-appellant's brief, p. 23.) These objections may be answered in the order in which they are made.

It is well established that due process is afforded in tax proceedings if objections to the validity and amount of a tax may be taken *in the proceedings to enforce payment.* There is no rule of law which requires a hearing *prior* to the making of the assessment. As was said in *Nickey* vs. *State of Mississippi,*

292 U. S. 393, 54 S. Ct. 743, 78 L. Ed. 1323, in affirming the decree of the State Supreme Court allowing recovery of taxes:

> "There is no constitutional command that notice of the assessment of a tax, and opportunity to contest it, must be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal before exaction of the tax and before the command of the state to pay it becomes final and irrevocable. *Wells, Fargo & Co.* v. *Nevada,* 248 U. S. 165, 39 S. Ct. 62, 63 L. Ed. 190; *Bristol* v. *Washington County,* 177 U. S. 133, 146, 20 S. Ct. 585, 44 L. Ed. 701; *McMillen* v. *Anderson,* 95 U. S. 37, 24 L. Ed. 335; see *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 168, 53 S. Ct. 98, 77 L. Ed. 231, 86 A. L. R. 298."

Similarly, in *Wells, Fargo & Co.* vs. *Nevada,* 248 U. S. 165, 39 S. Ct. 62, 63 L. Ed. 190, in affirming a judgment of the State Supreme Court in favor of the state in an action to enforce a tax, the court said:

> "A want of due process of law in the sense of the Fourteenth Amendment is asserted because the valuation by the state board was made without notice to the company or according it an opportunity to be heard. Assuming that the premise is correct (as to which the record is not entirely clear), we are unable to accept the conclusion. In Nevada the mode of enforcing a tax such as this is by a judicial proceeding wherein process issues and an opportunity is afforded for a full hearing. Only after there

> is a judgment sustaining the tax is payment enforced. Rev. Laws, 1912, secs. 3659–3665. This, as repeatedly has been held, satisfies the requirements of due process of law. *Hagar* v. *Reclamation District,* 111 U. S. 701; *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526, 537; *Gallup* v. *Schmidt,* 183 U. S. 300, 307."

So also in *Gallup* vs. *Schmidt,* 183 U. S. 300, 22 S. Ct. 339, 46 L. Ed. 283, in affirming the judgment of the State Supreme Court in favor of the county treasurer and against the tax debtor, the court said:

> "It has frequently been held by this court, when asked to review tax proceedings in state courts, that due process of law is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered. *Walker* v. *Sauvinet,* 92 U. S. 90; *Davidson* v. *New Orleans,* 96 U. S. 97; *Spencer* v. *Merchant,* 125 U. S. 345; *Allen* v. *Georgia,* 166 U. S. 138; *Orr* v. *Gilman, ante,* 278."

These same cases likewise answer the objection of the cross-appellant that there is no provision "for a hearing before the board to protest or contest the assessment after it has been paid." (Cross-appellant's brief, p. 23.) Due process does not require that there be a hearing before the board. Of course, such a hearing would be adequate, but here the state has chosen to go further and permit

the taxpayer to have his day in a regularly constituted court. At the time here involved there was no other method provided for the collection of the tax. Certainly, then, the cross-appellant can not say he was denied due process.

Finally, with regard to the cross-appellant's objection that the statutes make no provision for a hearing before the board exercises its power to revoke the distributor's license, it might even be conceded that this particular provision was unconstitutional, without in the least affecting the remainder of the statute. This provision has nothing whatsoever to do with the collection of the tax. Even if this penalty were invoked, the tax might remain unpaid and the question of the validity and amount of the assessment would still be open to question in the action which would be required in order to enforce collection of the tax. Furthermore, it can not be assumed that the board will exercise the power vested in them by this section for the purpose of collecting an invalid tax. Clearly, if they did seek to so exercise said power they might be restrained by a court of competent jurisdiction. In any event, there is no question raised in this case as to the *application* of said section. The receiver is not, therefore, in a position to complain. (See *Pauley* vs. *State of California,* 75 F. 2 (d) 120, 132.)

The cross-appellant also stresses (cross-appellant's brief, p. 20, pp. 21-22) the provision of section 9 to the effect that upon the failure of a dis-

tributor to report to the State Board of Equalization as required by the act, said board shall fix the amount of the license tax and shall add a penalty of 25 per cent thereto, and the State Controller shall proceed to collect said tax and penalty together with interest at the rate of 7 per cent per annum, "and the distributor is thereafter estopped from complaining of the amount thereof." This provision clearly refers only to assessments made upon the failure of the distributor to report as required by the act. The record herein contains no suggestion that the taxes and penalties here involved were levied and assessed under the provisions of section 9, nor was there ever any contention made that the distributor herein was estopped from complaining of the amount of the tax as provided in said section. On the contrary, as is shown by the findings of fact herein, the claim was merely for the taxes upon the amount of motor vehicle fuel actually sold and delivered by the distributor of which the cross-appellant is the receiver, and for the 10 per cent penalty thereon as provided by section 4 of the California Motor Vehicle Fuel Tax Act. (See transcript of record, pages 32a and 32b, paragraphs I, II and IV.) Assuming, then, that it would be a denial of due process to thus estop the distributor from complaining of the amount of the assessment under the circumstances to which the act applies, there is no such issue presented in this case. There has been no attempt to so apply the act.

The final argument of the cross-appellant in support of his proposition that the statute herein is unconstitutional in that it does not afford due process of law, relates to the provisions of section 18 of the act. (See cross-appellant's brief, pp. 23, 23.) This section provides that:

> "All matters of procedure relating to refunds of taxes or the cancellation of any assessment levied under the provisions of this act shall be governed by the provision of section three thousand six hundred sixty-nine of the Political Code. (Statutes 1925, p. 661.)

It is contended that the provisions of said section 18 merely make section 3669 of the Political Code applicable as to *procedure,* and that the substantive provisions of subdivision 3 of said section 3669 are not made applicable so as to enable the taxpayer to have any rights thereunder to recover taxes paid, and to obtain a cancellation of any excessive or invalid taxes. It may very well be that this contention of the cross-appellant is correct. However, for the convenience of the court the whole of said section 3669 is here set forth inasmuch as the cross-appellant has set forth merely excerpts therefrom. Said section is as follows:

> "1. All taxes assessed and levied under the provisions of section fourteen of article thirteen of the constitution of this state and sections of this code enacted to carry the same into effect, shall be paid to the state treasurer, upon the order of the controller, without deduction for

any taxes assessed and levied to pay the principal and interest of any bonded indebtedness mentioned in subdivision (e) of section fourteen of article thirteen of the constitution of this state, and the amount due to the cities, cities and counties, counties, towns, townships, and districts on account of said taxes assessed and levied for such bonded indebtedness shall be paid to said cities, cities and counties, counties, towns, townships, or districts in the manner provided by law. The controller must mark the date of payment of any tax on the record of assessments for state taxes.

2. Controller's receipt. The controller must give a receipt to the person paying any tax, or any part of any tax, specifying the amount of the assessment and the tax, or part of tax, paid, and the amount remaining unpaid, if any, with a description of the property assessed; provided, that the receipt for the second half of the taxes may refer, by number or in any other intelligible manner, to the receipt given for the first half of said taxes, in lieu of a description of the property assessed.

3. Taxes in excess of what was legally due. Whenever any taxes, penalties, or costs collected and paid to the state treasurer as hereinbefore provided, shall have been paid more than once, or shall have been erroneously or illegally collected, or when any taxes shall have been collected and paid pursuant to said provisions of law upon a computation erroneously made by reason of clerical mistake of the officers or employees of the state board of equalization, or shall have been computed in a manner contrary

to law, the state board of equalization shall certify to the state board of control the amount of such taxes, penalties, or costs, collected in excess of what was legally due, from whom they were collected or by whom paid, and if approved by said board of control, the same shall be credited to the company or person to whom it rightfully belongs, at the time of the next payment of taxes. No claim for such credit shall be so audited, approved, allowed, or paid unless presented within one year after the payment sought to be refunded.

4. Cancellation of assessment. In case the assessment of any property or any company is duplicated upon the record of assessments for state taxes, or there appears thereon the assessment of any company whose charter has been forfeited or right to do business in this state has been forfeited, or the assessment of any company which, for any reason, could not be legally assessed, the state board of equalization or the controller shall certify such fact to the state board of control and said board of control shall authorize the cancellation of such assessment."

It is true that said section 18, by its terms, incorporates said section 3669 only as to "matters of procedure," whatever this may mean. However, section 12 of the Motor Vehicle Fuel Tax Act provided for an audit and adjustment of the tax. (See appendix, p. 41.) Perhaps it was the intention of the legislature that said procedure, adopted by reference to said section 3669, was intended to apply to the substantive right created by said section 12.

In any event, however, the entire absence of any provision for refunds of taxes or cancellation of any assessment would not deprive the distributor of due process. As has already been pointed out, at the time here involved the tax could be *collected only by an action* at which time the distributor would be afforded full opportunity to present any valid defense which he might have.

It is therefore respectfully submitted that the contention of the cross-appellant that the statute involved herein is unconstitutional in that it does not afford due process of law is without merit.

CONCLUSION

In conclusion, it is urged that the District Court properly made its order allowing the tax claim of the State of California as a lien and prior claim. Said tax is entitled to priority as a lien claim. The failure to provide a statutory remedy does not affect the validity or existence of the lien. In fact, it does not even mean that the lien can not be enforced, for equity will enforce statutory or other liens where the remedy at law is inadequate.

Furthermore, the state is entitled to the priority accorded at common law to the sovereign. The common-law rule prevails in California in this regard.

Finally, the act provides due process, inasmuch as the only remedy for collecting the tax and enforcing the lien was by an action, in which the

defendant could contest the validity or amount of the tax.

The order of the District Court allowing the tax claim of the State of California as a prior and lien claim should therefore be affrmed.

Respectfully submitted.

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By JOHN O. PALSTINE,
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Attorneys for Cross-Appellee.

APPENDIX

CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT

(Stats. 1923, p. 571, as amended by Stats. 1925, p. 659, Stats. 1927, p. 1308, and Stats. 1929, p. 112.)

An act to regulate and license the business of producing, refining or distributing gasoline, distillate and other motor vehicle fuels, providing for the collection and disposition of license taxes, prescribing penalties for violation of the provisions of said act, and repealing all acts and parts of acts inconsistent herewith.

SECTION 1. The following words, terms and phrases shall whenever used in this act, have the meaning set forth in this section.

(a) "Motor vehicle" shall include every vehicle operated upon the highways of this state which is propelled by the use of motor vehicle fuel.

(b) "Motor vehicle fuel" shall include all gasoline, distillate, benzine, naphtha, liberty fuel and other volatile and inflammable liquids produced or compounded for the purpose of, or which may be used in, operating or propelling motor vehicles except kerosene and except unfinished products requiring rerun, blending, or compounding and which are not used or sold for use in such form for the purpose of operating or propelling motor vehicles.

(c) "Distributor" shall mean and include every person, firm, association or corporation who refines, manufactures, produces or compounds motor vehicle fuel in this state and sells the same in this state;

also every person, firm, association or corporation who imports any motor vehicle fuel into this state and sells the same in this state whether in the original packages or containers in which it is imported or otherwise than in such original packages or containers; or imports any such fuel for his own use in this state; also every person, firm, association or corporation who, having acquired in this state in the original package or container motor vehicle fuel which has been imported into this state, shall distribute or sell the same, whether in such original package or container in which the same was imported or otherwise than in such original package or container.

(d) "Service station" is a place operated primarily for the purpose of delivering motor vehicle fuel into the fuel tanks of motor vehicles.

SEC. 2. Every distributor shall within ten days after this act becomes effective and thereafter any person, firm, association or corporation before becoming a distributor shall register as such with the state board of equalization on forms to be prescribed, prepared and furnished by said board of equalization, and said state board of equalization shall issue to such distributor a license which shall be valid until revoked by said board as hereinafter provided.

SEC. 3. Every distributor shall from and after September 30, 1923, in addition to any other taxes provided by law, pay a license tax to the state controller of this state of two cents for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or

imported by such distributor into and distributed or sold by him in this state otherwise than in the original package or container in which such motor vehicle fuel was imported into this state, and for each gallon of motor vehicle fuel imported into this state and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter distributed or used by such distributor or sold by him otherwise than in the original package or container in which the same was imported into this state and for each gallon of motor vehicle fuel sold, distributed or used by him from any stock on hand or held in storage by him on September 30, 1923. From any amount found to be due upon any report hereunder the distributor shall first be allowed to deduct one per cent of the tax otherwise due hereunder to cover subsequent losses occasioned by evaporation and handling.

Sec. 4. License taxes herein required to be paid shall be paid in quarterly installments to the state controller for the quarters ending December thirty-first, one thousand nine hundred twenty-three, and ending March thirty-first, June thirtieth, September thirtieth and December thirty-first in the year one thousand nine hundred twenty-four and each year thereafter. Said tax shall be a lien upon all the property of the distributor. It shall attach at the time of the delivery or distribution, subject to the tax, shall have the effect of an execution duly levied against all property of the distributor, and shall remain until the tax is paid or the property sold for the payment thereof. The amount of such license tax becoming due during each such quarter

shall be paid within thirty-five days after the end of the quarter for which the same is due, and if not paid prior thereto shall become delinquent at five o'clock p.m., on the forty-fifth day after the end of such quarter, and ten per cent penalty shall be added thereto for delinquency. (Amendment approved May 23, 1925; Statutes 1925, p. 659.)

SEC. 5. Every distributor shall keep a record in such form as the state board of equalization shall require, showing the total number of gallons of motor vehicle fuel refined, manufactured, produced or compounded in this state and sold by such distributor within this state during each quarter; showing the total number of gallons of motor vehicle fuel imported into this state by such distributor and sold or distributed by such distributor in this state during each quarter, whether in the original package or container in which the same was imported or otherwise than in such original package or container and the total number of gallons of such fuel acquired by such distributor in the original packages or containers in which the same was imported into this state and thereafter sold, distributed or used by him.

SEC. 6. Each distributor shall, within twenty days after the quarter ending December thirty-first, one thousand nine hundred twenty-three, and within twenty days after the end of each following quarter, file on forms to be prescribed, prepared and furnished by the state board of equalization, a verified statement showing the total number of gallons of motor vehicle fuel refined, manufactured or compounded by such distributor within this state and sold during such quarter by such distributor within this state; the total number of gallons of

motor vehicle fuel imported into this state by such distributor and sold or distributed within this state by such distributor during such quarter, when sold or distributed otherwise than in the original packages or containers in which imported into this state or used by such importer; also the number of gallons of such fuel acquired by him in the original package or container in which the same was imported into this state and thereafter sold, distributed or used by him; and such other information as the state board of equalization may require. The state board of equalization shall compute the license tax due or to become due hereunder, and extend the same upon a tax roll prepared and kept for the purpose, and on or before thirty days from and after the close of each quarterly period as herein defined, shall deliver said tax roll to the state controller, who shall give due notice of the dates when said taxes will become due.

Sec. 7. All motor vehicle fuel distributed by any distributor to any of its service stations, or other agencies, tank trucks, wagons, boats, barges, or other facilities operated by such distributor in this state shall for the purposes of this act be considered in the same manner and the same license tax shall be paid upon such motor vehicle fuel as though the same had been sold and delivered by such distributor; provided, that the amount of motor vehicle fuel distributed during any quarter to any such agency, tank truck, wagon, boat, barge, or other facility operated by the distributor is hereby defined to mean the amount thereof thereafter found to have been sold and delivered therefrom during such quarter plus one-ninety-ninth thereof but excluding therefrom

deliveries to service stations operated by such distributor.

All motor vehicle fuel used by a distributor in the operation of any motor vehicle shall for all the purposes of this act be considered in the same manner and the same license tax shall be paid upon such motor vehicle fuel as though the same had been sold by such distributor; provided, however, that in lieu of the collection and refund of the tax upon such fuel used for exempt purposes a credit may be given such distributor upon his tax return and assessment.

Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel. (Amendment approved May 23, 1925; Statutes 1925, p. 659.)

SEC. 8. It shall be unlawful for any distributor to fail, neglect or refuse to make and file any statement required by this act in the manner or within the time therein provided, or to make any such statement false in any particular.

SEC. 9. If any distributor shall fail, neglect or refuse to file reports herein provided, the state board of equalization, immediately after such time has expired, shall proceed to inform itself as best it may regarding the matters and things required to be set forth in such statement, and, from such information as it is able to obtain, shall make a statement showing such matters and things and shall determine and fix the amount of the license tax due to the state from such distributor for such quarter, and shall add to the amount of such license tax a penalty of twenty-five per cent thereof, and shall deliver such statement to the state controller who shall proceed to collect the amount of such license tax with the

penalty added thereto together with interest on the whole thereof at the rate of seven percent per annum from the date upon which such statement should have been filed together with any penalty for delinquent payment that may have accrued by reason of section 4 of this act but the penalty for delinquent payment shall not apply to or be charged against the penalty provided for in this section for failure to furnish a report and the distributor is thereafter stopped from complaining of the amount thereof.

Upon the request of the state controller, it shall be the duty of the attorney general to commence and prosecute to final determination in any court of competent jurisdiction an action at law to collect any tax herein imposed which is delinquent and all penalties and interest accrued. (Amendment approved Apr. 6, 1929; Statutes 1929, p. 112.)

SEC. 10. The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this state in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and exported for use outside this state, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government but every distributor shall be required to report such exports and sales to the state board of equalization in such detail as that board may require. (Amendment approved May 23, 1927; Statutes 1927, p. 1308.)

SEC. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated, or intended to be operated upon the public highways of the State of California or export the same for use outside of this state; also any person, firm, association or corporation who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mails, and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such tax to the price of such fuel, shall be reimbursed and repaid the amount of such tax paid by him or it upon presenting to the state controller an affidavit accompanied by the original invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and the same has been used by said consumer for the transportation of rural free delivery mails or for uses other than in motor vehicles operated upon any of the public highways in the State of California. The said state controller, upon the presentation of such affidavits and such invoices or vouchers, shall cause to be paid to such consumer, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on the motor vehicle fuel so purchased or so used. All such applications shall be filed with the state controller within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after such twelve months shall not

be considered for any purpose by the state controller, the treasurer or the State of California. (Amendment approved May 23, 1927; Statutes 1927, p. 1308.)

SEC. 12. The state board of equalization shall have the power and it is hereby authorized to make any and all such examination of the records of distributors as it may deem necessary in carrying out the provisions of this act. If such examinations made by said board shall disclose that any reports of distributors of motor vehicle fuel theretofore filed with said board by said distributors, pursuant to the requirements of this act, have shown incorrectly the amount of gallonage of motor vehicle fuel distributed or the tax accruing thereon, said board shall have the power and is hereby authorized to make such changes in subsequent assessments of said distributors under this act as it may deem necessary to correct the errors disclosed by its examination of the records of said distributors as hereinbefore authorized. The cost if any of such examination to be payable from the regular appropriation for clerical assistance of said board. (Amendment approved May 23, 1927; Statutes 1927, p. 1308.)

(Section 13 contains lengthy provisions relating to the distribution of the tax proceeds, and so is not set forth, being immaterial here.)

SEC. 14. Any person, firm, association or corporation or any officer or agent thereof failing to pay the tax as herein provided, or violating any of the other provisions of this act, or unlawfully making any false statement, or concealing any material fact in any record, report, affidavit or claim provided for herein, shall be guilty of a misde-

meanor, unless such act is by any other law of this state declared to be a felony, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

The state board of equalization shall have power to revoke the license of any distributor refusing or neglecting to comply with the provisions of this act. (Amendment approved May 23, 1925; Statutes 1925, p. 659.)

SEC. 15. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional.

SEC. 16. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

SEC. 17. This act shall go into effect upon the thirtieth day of September, one thousand nine hundred twenty-three, provided there shall have been theretofore enacted that certain act to be known and cited as the "California vehicle act" introduced in the forty-fifth session of the Legislature as Senate Bill No. 743.

SEC. 18. All matters of procedure relating to refunds of taxes or the cancellation of any assess-

ment levied under the provisions of this act shall be governed by the provision of section three thousand six hundred sixty-nine of the Political Code. (New section adopted May 23, 1925; Statutes 1925, p. 659.)

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IN THE

United States Circuit Court of Appeals

IN AND FOR THE

NINTH CIRCUIT

NORA L. POWERS and GEORGIANA R. JUDD,
Complainants,

vs.

LAKE VIEW OIL AND REFINING COMPANY, a corporation,
Defendant.

STATE OF CALIFORNIA,
Appellant and Cross-Appellee,

vs.

PAUL J. HISEY, as Receiver of Lake View Oil and Refining Company, a corporation,
Appellee and Cross-Appellant.

PETITION OF STATE OF CALIFORNIA FOR REHEARING

U. S. WEBB,
Attorney General,
JOHN O. PALSTINE,
Deputy Attorney General,
Attorneys for State of California, Petitioner.

CALIFORNIA STATE PRINTING OFFICE
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TABLE OF CASES AND AUTHORITIES CITED

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Appellee and Cross-Appellant.

PETITION OF STATE OF CALIFORNIA FOR REHEARING

To the Honorable, the United States Circuit Court of Appeals in and for the Ninth Circuit:

The State of California, tax creditor and appellant and cross-appellee in the above entitled proceeding, feeling that certain errors of law and fact and certain clerical errors have been made in the judgment heretofore, on July 6, 1936, filed and entered in the above entitled proceeding modifying

and affirming the judgment of the court below, hereby respectfully petitions for a rehearing of said cause, for the following reasons:

I

Because the order modifying and affirming the order of the lower court inadvertently (in the last paragraph of the court's decision) specifies an incorrect amount as the amount of the penalty which must be included in the tax as allowed.

II

Because said order does not provide for interest on said claim, of the same priority as the claim itself, at least from the date of the order by the court below until said claim is paid.

These errors will be plainly apparent to the court upon a review and further consideration of the record herein.

This petition is based upon the files and records herein, and upon the briefs heretofore filed herein and upon the additional points and authorities attached hereto and made a part of this petition.

For the reasons herein stated, the State of California prays that it be granted a rehearing in regard to the matters hereinabove referred to, or that this court's decision be revised so as to order the payment of a penalty in the amount of $3,414.29, and the payment of interest on the claim of said State at the rate of 7% per annum from May

15, 1931, or, in any event, from December 28, 1935, until said claim is paid in full, said interest to be paid as of the same priority and status as the principal claim of said State.

Respectfully submitted.

THE STATE OF CALIFORNIA,
Appellant and Petitioner,

By U. S. WEBB,
Attorney General,

JOHN O. PALSTINE,
Deputy,
Attorneys for said Petitioner.

We hereby certify that the foregoing petition is, in our opinion, well founded in law, and should be granted, and is not interposed for delay.

U. S. WEBB,
Attorney General,

By JOHN O. PALSTINE,
Deputy,
Attorneys for Petitioner,
State of California.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION OF STATE OF CALIFORNIA FOR REHEARING

The question of the right of the State of California to interest on its claim herein for taxes, was not heretofore exhaustively briefed or argued for the benefit of the court, because of certain peculiar circumstances which apparently were not clearly brought to the court's attention and to which we will now refer. The lower court in effect ordered the payment of interest if and when all other creditors were paid in full. (Tr., p. 33.) The receiver did not assign this order as error, although the State did. (Tr., pp. 37–38, Assignments VII, IX and XV.) Therefore, the State, in its Appellant's Brief, presented only its arguments upon the question of the propriety of said order in so far as it related to the *priority* of said interest. (App's. Br., p. 21.) No authorities were cited upon the question of the right to any interest in the first instance, because this was not in issue before the court.

The receiver, however, in his Appellee's Brief, raised the question of the right of the State to *any* interest, citing authorities to the effect that, in the absence of statutory provision therefor, interest is not allowable on tax obligations in the state courts of California. (Appellee's Br., pp. 14-19.) It was apparently assumed by the appellee that the State based its *right* to interest upon the State law. In fact, this was not the basis upon which the State

rested its claim to interest, as will be hereinafter more particularly set forth. However, at the oral argument the attorneys for the respective parties were able to *agree* that the State was entitled to interest on its claim, with the same status as its principal claim, *from the date of the order of the court below allowing said claim.* The court will undoubtedly recall that counsel for the receiver stated to the court that he was satisfied that the law required the allowance of interest from that date with the same priority as the principal claim for taxes. In view of this concession, counsel for the State stated that, in order to avoid any question as to whether the issue of the State's right to interest prior to the date of the order allowing its claim was, in any event, properly raised before the court below, the State would, for the purposes of this appeal, withdraw its demand for any interest except that to which the receiver conceded the State was entitled. The State did not, therefore, present to the court any argument upon the matter of interest. In other words, in order to avoid further controversy in this receivership proceeding on this point, but without prejudice to its rights in any subsequent proceedings, the State was willing to accept an order allowing interest from the date of the order allowing its claim, to be paid with the same priority as its claim as allowed.

The State still desires to abide by this understanding in this case, without prejudice to its right in any other receivership proceeding in which the

question of its right to interest from the date of delinquency is properly presented to the court below, to raise such issue before this court. The State of California therefore prays that the court's decision be revised so as to adopt this understanding between counsel.

It is believed that, upon a consideration of the principles involved, the court will conclude that such concession is entirely proper, and that such a revision of its order would be in accordance with the law, even as the same is understood by the receiver, as well as in accordance with said understanding of counsel. For the assistance of the court, therefore, we will state briefly the principles upon which said understanding was based:

A. Although taxes do not bear interest in the California state courts in the absence of statutory provision therefor, this does not mean that such an obligation does not bear interest in said courts when it is reduced to judgment. In California, judgments for taxes, like judgments on all other obligations, bear interest at the rate of 7 per cent per annum.

People vs. *Central Pac. R. Co.,* 105 Cal. 576, 594;
Himmelman vs. *Oliver,* 34 Cal. 246;
California Code of Civ. Proc. sec. 682.

B. The allowance of the State's claim by the court below was the equivalent of a reduction of said claim to judgment, the only difference being

that no execution could be had thereon, because the property was in the custody of the court.

53 C. J. 240-241, "Receivers," Sec. 403, and cases cited;

National Bank of the Commonwealth vs. *Mechanics National Bank,* 94 U. S. 437, 24 L. Ed. 176 (1876);

In re John Osborn's Sons & Co., 177 F. 184 (2d C. C. A. 1910);

Myers vs. *Colo. Pulp & Paper Co.,* 35 Pac. 2d. 1020 (Colo. 1934).

Clearly then, even if, as is contended by the receiver, the rule in the state courts is controlling herein, the State is entitled to interest from the date of said order allowing its claim, and, it is beyond dispute that, *when a creditor is entitled to interest* on his preferred or lien claim, such interest must be paid, if there are sufficient funds therefor, even though the balance does not permit of payment in full or at all of inferior claims.

Bernardin vs. *Board of Commissioners,* 74 F. 2d 809.

The State of California, therefore, respectfully urges that it be granted a rehearing in this regard, or that the court's decision be revised so as to order the payment of interest on the claim of said State, at the rate of 7 per cent per annum from December 28, 1935, until paid, said interest to be paid as of the same status as the principal claim of said State, the court to reserve for future decision, in a case other than the present receivership proceeding, and

after the issue has been properly raised in the trial court, the question of whether the State is entitled to interest on its claim *prior* to the date of the order allowing its claim.

In the event the court should not desire to base its decision upon said understanding of counsel herein, supported by the aforesaid authorities, the State of California respectfully urges that the court then consider the argument of the State in support of its right to interest *from the date the obligation herein became delinquent,* viz., May 15, 1931. As has been stated, the State does not, as the receiver has assumed, rely upon the rule *in the state courts* of California as requiring such an order. On the contrary, it is conceded by the State that *if* this were an action in the state courts in California, it would not be entitled to interest on its claim, prior to the reduction of said claim to judgment. It is submitted, however, that the question of the State's right to interest *in this proceeding* should be governed by the rule which is applied in the *federal courts.* The allowance of interest in the federal courts is not dependent upon the existence of any state statute authorizing interest.

> *Young* vs. *Godbe,* 82 U. S. (15 Wall.) 562, 21 L. Ed. 250 (1872).

In the federal courts, interest is allowed upon any liquidated obligation which is past due.

> *Billings* vs. *U. S.,* 232 U. S. 261, 34 S. Ct. 421, 58 L. Ed. 596 (1913);

Nolte vs. *Hudson Nav. Co.,* 8 F. 2d 859, 867 (2d C. C. A. 1925);

Butte A. & P. Ry. Co. vs. *U. S.,* 61 F. 2d 587, 590 (9th C. C. A. 1932).

This general federal rule applies to *tax* obligations, as well as to contract debts, unless interest on taxes is expressly forbidden by statute.

Billings vs. *U. S. supra.*

There the court said, after reviewing the federal authorities:

> "From this review it results that the doctrine as to nonliability to pay interest for taxes which have become due which prevails in the state courts is absolutely in conflict with the doctrine applied to the same subject in this court and cannot now be made the rule without repudiating settled principles which have been here applied for many years in various aspects and without in effect disregarding the sanction either expressly or impliedly given by Congress to such rules. From this it follows that although in the cases in this court to which we at the outset made reference which enforced the liability for interest and which are here controlling if they be not now overruled, there was no controversy as to the liability for interest, this was presumably because the matter was deemed not disputable as the direct result of the then settled doctrine that interest could be recovered by the United States on a default in payment of import duties. Under this condition we can see no ground for departing from the rule which the cases enforced, and we are

> therefore constrained to the conclusion that the court below was wrong in rejecting the prayer of the Government for interest and its action in that respect must be reversed while in others it must be affirmed."

It has now become firmly established, after much confusion following the decision in

> *Thomas* vs. *Wm. Car Co.*, 149 U. S. 95, 13 S. Ct. 824, 37 L. Ed. 663,

that the appointment of a receiver has no effect upon the running of interest upon obligations of the insolvent person. In most receiverships, it is true, there are no funds with which to pay interest. But where there are sufficient funds therefor, interest must be paid on claims, as a part of the principal.

> *Bernardin* vs. *Bd. of Commissioners, supra.*

While many of the cases applying this rule happen to involve claims which would be entitled to interest even under the state law, there is no case in which the court has squarely *held* that interest is *not* allowable on a claim in a federal receivership proceeding because interest would not have been allowable in the state courts if an action had been brought in the state courts to obtain a judgment on the obligation on which such claim is based.

On the contrary there are many cases which allow interest on claims in federal receivership proceedings without mentioning any state law or decisions authorizing such interest in the *state* courts.

These cases clearly assume, and impliedly hold, that where interest is allowable in the *federal* courts in the absence of any receivership, the creditor is entitled to the same interest if a receiver is appointed and there are sufficient funds therefor.

See

First Nat. Bank vs. *Ewing,* 103 F. 168, 190–191 (5th C. C. A. 1900), certiorari denied, 179 U. S. 686, 21 S. Ct. 919, 45 L. Ed. 386 (allowing interest on state and municipal taxes);

Huff vs. *Bidwell,* 218 F. 6, 9–10 (5th C. C. A. 1914) (allowing interest "on all the claims, including the tax claims and paving assessments. * * *");

Pearsall vs. *Central Oil & Gas Co.,* 23 F. 2d 716 (D. C. Pa. 1927) (allowing interest on internal revenue tax); and

Sawyer Tanning Co. vs. *C. J. O'Keefe Shoe Co.,* 23 F. 2d 717 (D. C. Mass. 1927) (where the court allowed interest at 6% on the government's tax claim, notwithstanding the tax statute specifically provided that the statutory penalty and interest at 1% per month should not apply to insolvent estates).

And see

Texas Co. vs. *International & G. N. Ry. Co.,* 250 F. 742, 744 (5th C. C. A. 1918), certiorari denied, 249 U. S. 613, 39 S. Ct. 388, 63 L. Ed. 802 (where it is held that supply claimants are entitled to interest upon their claims as preferred claims).

To the same effect is

Pen. Steel Co. vs. *N. Y. City Ry.,* 216 F. 458,

471–472 (2d C. C. A. 1914), certiorari denied, 238 U. S. 632, 35 S. Ct. 794, 59 L. Ed. 1498.

These decisions were clearly based solely on the general rule in the federal courts that persons to whom money in a liquidated amount is due, are entitled to interest for delay in payment.

Similarly, in

Tredegar Co. vs. *Seaboard Air Line Ry.*, 183 F. 289 (4th C. C. A. 1910),

the court held that interest should be paid on supply claims notwithstanding there was no provision therefor in the contract or by statute. The portion of this decision which relates to the *time* during which interest is recoverable in receivership proceedings undoubtedly would not be followed today, being founded upon a now rejected interpretation of *Thomas* vs. *Wm. Car Co., supra.* However, it is submitted that the portion of the decision is sound, which in effect holds that, in accordance with the general federal rule, a creditor is entitled to interest, even in a receivership proceeding, whether or not interest is provided for by the contract or by statute.

See also

American Brake Shoe etc. Co. vs. *New York Rys. Co.,* 293 F. 612 (D. C. N. Y. 1922), affirmed as modified in other particulars in 293 F. 633 (2d C. C. A. 1923) (holding interest allowable on claims for *rental*);

and

Richmond & I. Const. Co. vs. *Richmond etc. R. Co.,* 68 F. 105, 114 et seq. (6th C. C. A. 1895) (holding certain lien creditors entitled to interest, as of the same status as their claim, notwithstanding there was no provision for such interest by their contract or by statute).

Even general creditors are entitled to interest. See

Printsch Compressing Co. vs. *Buffalo Gas Co.,* 280 F. 830, 844 (2d C. C. A. 1922) (allowing interest on *general claims* to the extent funds were available therefor);

and

Ohio Savings Bank & Trust Co. vs. *Willys Corporation,* 8 F. 2d 463.

In other words, by reason of the *federal* rule as to interest on past due obligations, these cases impliedly hold that *all* creditors of persons in receivership are entitled to interest on their respective claims before any dividends or payments are made to creditors or persons of inferior standing. For that matter, if there were *no* cases on the proposition, it would be manifestly inequitable to not allow the State interest when any other creditors of the same or a superior class would receive interest if there were sufficient funds therefor. The object of the federal rule with regard to interest is to com-

pensate the creditor for the delay of his debtor in paying the obligation.

Billings vs. *U. S., supra.*

The receiver herein has benefited by his failure to pay the State's tax claim, to the extent of the interest on said claim, and the State has been damaged to that extent. Thus, if the receiver, not having adequate funds therefor, had borrowed money with which to pay these taxes, he unquestionably would have had to pay interest.

> "When taxes are due on property in the hands of a receiver, and he has no funds to pay them, the court will authorize him to borrow money for that purpose, and make the obligation given for money so borrowed a prior lien on the property on which the taxes were due." *Woodbury* v. *Pickering Lbr. Co.,* 1 F. Supp. 92 (Mo. D. C.); *T. H. Mastin & Co.* v. *Pickering Lbr. Co.,* 2 F. Supp. 605 (Cal. D. C.); 23 R. C. L. 97, "Receivers," sec. 107.

Again, if the surety on a tax bond had paid said taxes, said surety would have been entitled to interest with the same priority as the tax creditor would have had.

> *American Surety Co.* vs. *Carbon Timber Co.,* 263 F. 295 (8th C. C. A. 1919).

However, in the principal case, instead of said taxes being paid either by a surety on a tax bond, or with money borrowed by the receiver, the receiver has, in effect, taken advantage of the "credit"

extended directly by the State. He has had the same benefit as in either of the examples cited. He should therefore be required to pay the State the same as he would have had to pay any other creditor for the delay in payment. From an equitable viewpoint there is no reason why the State should be treated any differently than any other creditor of the same class in regard to the payment of interest if there are sufficient funds therefor.

In brief, then, the rule as to interest in receivership proceedings in the federal courts is the same as the general federal rule as to interest, subject only to the fact that in receivership proceedings interest is not in general *paid* because of the lack of sufficient funds. The general federal rule requires the allowance of interest on taxes from the date of delinquency, unless *forbidden* by statute. The same rule would apply in receivership proceedings if there is sufficient money to pay in full, with interest, all claims of the same class as that of claims for taxes. Interest should be so allowed the State of California herein, from the date of the delinquency in the payment of the taxes in question, viz, May 15, 1931, until paid.

Such is, in general, the argument which the state would normally have presented to the court at the oral argument, in response to the appellee's citation of the California authorities to the effect that interest would not have been allowed on its tax claim in the *state courts*. As has been pointed out, the State did not urge this upon the court because it

was understood that it had been conceded that the State was at least entitled, without prejudice as to other proceedings, to interest from the date of the order allowing its claim, with the same priority as its claim as allowed.

The court is respectfully urged to grant the State of California a rehearing upon the question of its right to interest, or to modify its order so as to allow interest on the State's claim from May 15, 1931, until paid, or, at least, and without prejudice as to subsequent proceedings, so as to allow interest upon its claim from the date of the order allowing said claim, viz, December 28, 1935, until paid, such interest to be paid with the same priority as the principal claim of said State.

Respectfully submitted.

U. S. WEBB,
Attorney General,

JOHN O. PALSTINE,
Deputy Attorney General,
Attorneys for State of California, Petitioner.

o

No. 8089

14

United States

Circuit Court of Appeals

For the Ninth Circuit.

A. R. MITTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8089

United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

JOHN B. TANSIL, Esq.,
United States Attorney,
R. LEWIS BROWN,
Assistant United States Attorney,
ROY F. ALLAN, Esq.,
Assistant United States Attorney,
DONALD STOCKING, Esq.,
Assistant United States Attorney,
Butte, Montana,
Attorneys for Plaintiff and Appellee.

C. A. SPAULDING, Esq.,
Helena, Montana,
Attorney for Defendant and Appellant.

[1*]

In the District Court of the United States in and for the District of Montana.

No. 5601.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. R. MITTON,

Defendant.

BE IT REMEMBERED, that on July 14, 1934, an Indictment was presented and filed herein, counts

*Page numbering appearing at the foot of page of original certified Transcript of Record.

ONE and SEVENTEEN of which are in the words and figures as follows, towit: [2]

In the District Court of the United States, District of Montana, Havre Division.

UNITED STATES OF AMERICA,

Plaintiff,

v.

A. R. MITTON,

Defendant.

INDICTMENT

In the June, 1934 term of the above entitled Court, held at the city of Helena in the State and District of Montana the Grand Jurors of the United States of America, duly empaneled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all public offenses against the laws of the United States within said State and District, upon their oaths and affirmations do find, charge and present:

COUNT ONE

(Sale of beer to an Indian) (25-241)

That on or about the 15th day of June, 1934, one A. R. Mitton, whose true name is to the Grand Jurors aforesaid unknown, at and within those certain premises occupied by the defendant as a store, in the town of Poplar, County of Roosevelt, in the State and District of Montana and within the jurisdiction of this Court, did, then and there wrong-

fully, unlawfully, and feloniously sell to an Indian person named Richard Crow, then and there a ward of the Government of the United States and under the charge of the Superintendent in charge of the Fort Peck Indian Reservation, in the State and District of Montana, a malt and intoxicating liquor, to-wit, beer, the exact quantity and character of which are to Grand Jurors aforesaid unknown; contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

COUNT SEVENTEEN

(Introducing Liquor on Indian Reservation)

(25-241)

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, and present:

That one A. R. Mitton, whose true name is to the Grand Jurors aforesaid unknown, late of the State and District of Montana, on the 2nd day of June, 1934, within the boundaries of the Fort Peck Indian Reservation, in the State and District of Montana and within the jurisdiction of this Court, did then and there wrongfully, unlawfully and feloniously introduce into said Indian Reservation, a malt and intoxicating liquor, to-wit: beer, the exact quantity and character of which are to the Grand Jurors aforesaid unknown, the said Fort Peck Indian Reservation then and there being an

Indian Country and under the exclusive jurisdiction of the United States; contrary to the form, force and effect of the Statute in such case made and provided and against the peace and dignity of the United States of America.

JAMES H. BALDWIN
United States District
Attorney. [4]

[Endorsed]: No. 5601. United States District Court of Montana, Havre Division. The United States of America vs. A. R. Mitton. Indictment. A true bill, Clyde W. Burgan, Foreman. Filed in open Court this 14 day of July A. D. 1934. C. R. Garlow, Clerk. Bail, $..... On 500.00 bond. [5]

Thereafter, on November 23, 1935, the defendant was duly arraigned, entered a plea of not guilty, was duly tried by the court without a jury, trial by jury having been waived, was found guilty as to counts one and seventeen of the Indictment, and was sentenced; the record of arraignment, plea, trial and judgment being in the words and figures as follows, towit:

RECORD OF PLEA, TRIAL AND JUDGMENT. [6]

In the District Court of the United States in and for the District of Montana.

No. 5601, United States vs. A. R. Mitton.

This cause was duly called for arraignment, plea and trial this day, the defendant being present with

his attorney, Mr. C. A. Spaulding, and Mr. R. Lewis Brown, Assistant United States Attorney, appearing for the United States. Thereupon defendant was arraigned and answered that his true name is A. R. Mitton.

Thereupon defendant waived the reading of the indictment and entered a plea of not guilty.

Thereupon by agreement of the parties, expressed in open court, trial by jury was waived and the cause was tried to the court without a jury.

Thereupon Mr. Gordon Johnson was called and sworn as a witness for the United States, whereupon the defendant objected to the introduction of any evidence upon the ground that the Indictment does not state a public offense or any offense against the laws of the United States, which objection was by the court overruled and the exception of the defendant noted.

Thereupon all counts of the Indictment herein were by the District Attorney dismissed, except counts one and seventeen.

Thereupon counsel for the respective parties stipulated and agreed in open court to certain facts relating to the government's proof, which agreed statement of facts was read into the record and on which the case was submitted to the court, without argument.

And thereupon, after due consideration, court finds the defendant guilty as charged in said counts one and seventeen of the Indictment herein, and rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the offense of unlawfully selling malt and intoxicating liquor, to wit: beer, to an Indian ward of the United States, on June 15, 1934, at Poplar, in the State and District of Montana, as charged in count one of the Indictment herein, and the offense of unlawfully introducing malt and intoxicating liquor, to wit, beer, in the Indian Country, on June 2nd, 1934, within the boundaries of the Fort Peck Indian Reservation, in the State and District of Montana, as charged in count seventeen of the Indictment herein, in violation of Section 241 of Title 25, U. S. Code;

It is therefore considered, ordered and adjudged that for said offense you, the said defendant be committed to the custody of the Attorney General of the United States or his authorized representative for confinement in a jail for the term of Sixty Days and pay a fine of One Hundred Dollars, with like imprisonment until paid, said sentence being suspended and defendant placed upon probation for the period of Three Years.

Thereupon defendant was granted thirty days from today for Bill of Exceptions herein.

Judgment rendered and entered November 23, 1935.

C. R. GARLOW, Clerk. [7]

Thereafter, on December 11, 1935, Stipulation for settlement and allowance of Bill of Exceptions was duly filed herein, being in the words and figures as follows, towit: [8]

[Title of Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties to the above entitled action that the proposed bill of exceptions heretofore tendered by the above named defendant may be signed, settled and allowed as a bill of exceptions in said cause without amendment and as now drafted.

R. LEWIS BROWN
Asst. U. S. Attorney.
Attorney for Plaintiff.

C. A. SPAULDING
Attorney for Defendant.

[Endorsed]: Filed Dec. 11, 1935. C. R. Garlow, Clerk. [9]

Thereafter, on December 17th, 1935, Bill of Exceptions was duly signed, settled and allowed, which Original Bill of Exceptions is transmitted with this transcript on appeal.

[Title of Court and Cause.]

BILL OF EXCEPTIONS [10]

BE IT REMEMBERED, That the above entitled cause came on regularly for trial November 23rd,

1935, at two o'clock P. M. in the above entitled Court at Great Falls, Montana, before the Honorable Charles N. Pray, Judge, sitting without a jury, a jury for the trial of said cause having been in open court expressly waived. R. Lewis Brown, Esq., assistant United States District Attorney appeared for the plaintiff, and C. A. Spaulding, Esq. appeared for the defendant. Thereupon the following proceedings were had, orders made, objections interposed, rulings made by the Court, and exceptions taken and the proceedings, hereinafter appearing and the evidence and testimony and stipulations of the parties hereinafter set out is all the evidence and testimony offered and all the stipulations of the parties on said trial, to-wit:

The COURT: In the case of the United States against A. R. Mitton, is the plaintiff ready?

Mr. BROWN: The plaintiff is ready, Your Honor.

The COURT: And the defendant?

Mr. SPAULDING: Yes, Your Honor.

The COURT: Very well, you may proceed.

Mr. SPAULDING: The record may show, if Your Honor please, that we have waived a jury, and that we have agreed to try the case to the court sitting without a jury.

The COURT: You have agreed that this case may be tried to the court without a jury?

Mr. SPAULDING: We have both agreed to that.

The COURT: Very well; the objection is overruled.

T. JOHNSON,

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Brown

Q. You may state your name.

Mr. SPAULDING: Just a moment, if the Court please. The defendant objects to the introduction of any evidence, in this case upon the following grounds:

1. That the indictment in this case charges no offense against the laws of the United States;

2. That the said indictment charges no public offense of any character.

The COURT: The objection is overruled.

Mr. SPAULDING: Note an exception, please.

Mr. BROWN: If Your Honor please, Mr. Spaulding and I have held a little conference and have written out a stipulation that we wish the record to show.

The COURT: Very well.

Said stipulation in writing is in words and figures as follows, to-wit:

[Title of Court and Cause.]

STIPULATION.

IT IS STIPULATED by and between the plaintiff and the defendant in this action, that this prosecution is brought and the indictment is founded

under the provisions of Section 241 of Title 25 of the United States Code, and that if Richard Crow were present in Court, he would testify that on the 15th day of June, 1934, he was an Indian and ward of the Government and under the charge of the Superintendent in charge of the Fort Peck Indian Reservation, in the State and District of Montana, and that on said day, the defendant, A. R. Mitton, sold and delivered to the said Richard Crow, in the town of Poplar, County of Roosevelt, State and District of Montana, a quantity of malt liquor, to-wit, beer, the said beer being of an alcoholic content of 3.2 per cent by weight, and that said beer, so sold and delivered, was beer of an alcoholic content, authorized to be sold by Chapter 106 of the Laws of 1933, as amended by Chapter 46 of the Laws of the Extraordinary Session of the Twenty-third Legislative Assembly of the State of Montana.

It is further stipulated that defendant waives any proof or necessity of proof by the United States in this case of the intoxicating or non-intoxicating character of the beer so sold and delivered.

Dated this 23rd day of November, 1935.

R. LEWIS BROWN,
Assistant U. S. Attorney.
Attorney for Plaintiff.

C. A. SPAULDING,
Attorney for Defendant.

In addition to that we have a further stipulation. The record may show that it is stipulated and agreed by and between the defendant and the plain-

tiff that on the 2d day of June, 1934, the defendant A. R. Mitton possessed a quantity of malt liquor, to wit, beer; that the said beer was of an alcoholic content of 3.2 per cent by weight; that said beer so possessed was of an alcoholic content authorized to be possessed by chapter 106 of the laws of 1933, as amended by chapter 46 of the laws of the Extraordinary Session of the Twenty-third Legislative Assembly of the State of Montana; and that the said beer so possessed by the said defendant A. R. Mitton on the 2d day of June, 1934, was possessed by him within the boundaries of the Fort Peck Indian Reservation then and there being an Indian Reservation under the exclusive jurisdiction of the United States.

If the court please, there are many counts in this indictment, and I think the record possibly will be simplified if I retained in the indictment only counts 1 and 17. I will retain count 1 in the indictment. That is the sale and is brought under Section 241 of Title 25 of the United States Code.

The COURT: And Count 17?

Mr. BROWN: Yes. That is also brought under 241.

The COURT: Very well.

Mr. BROWN: Count 17, Your Honor, a charge of introduction under 241.

The COURT: Do you want to stipulate as to certain counts?

Mr. BROWN: I believe it would simplify the record to stipulate one count of sale and one count of introduction under 241 in the indictment.

Mr. SPAULDING: And dismiss the other counts?

Mr. BROWN: Yes.

Mr. SPAULDING: It is clear that this possession count being count 17, is with reference to and brought under 241?

Mr. BROWN: Yes.

Mr. SPAULDING: Let the record so show then.

Mr. BROWN: It is stipulated and agreed that the defendant A. R. Mitton did on the 2d day of June, 1934, introduce certain malt liquor, to-wit, beer, the said beer being of an alcoholic content of 3.2 per cent by weight, that the said beer so introduced was beer of an alcoholic content authorized to be manufactured and sold by Chapter 106 of the Laws of 1933, as amended by Chapter 46 of the Laws of the Extraordinary Session of the Twenty-third Legislative Assembly of the State of Montana; that the said defendant on said date did introduce the said beer within the boundaries of the Fort Peck Indian Reservation in the State and District of Montana, and within the jurisdiction of the court, the said Fort Peck Indian Reservation then and there being Indian country under the exclusive jurisdiction of the United States as charged in Count 17 of the Indictment.

Mr. BROWN: We will now dismiss, Your Honor, all counts of the indictment except count 1 and count 17.

Mr. SPAULDING: So that there will be no doubt, it is further stipulated and agreed that the

introduction of said beer is claimed by the Government to be a violation of section 241, Title 25, of the United States Code, and that said count 17 of said indictment is founded upon said section.

Mr. BROWN: Very well.

Mr. SPAULDING: I do not suppose we need to argue the case to the court. I am ready to submit it without argument.

Mr. BROWN: The Government submits it, Your Honor.

The COURT: Very well. So I suppose there is nothing for the court to do but to find the defendant guilty and to pass sentence on the record—that is the record that you gentlemen have stipulated?

Mr. BROWN: Yes, Your Honor.

The COURT: Let the record show that the court imposes a sentence of 60 days imprisonment and $100.00 fine and suspends sentence and puts the defendant on probation for three years.

Mr. SPAULDING: May I have an exception, Your Honor?

The COURT: Oh yes. I took it for granted that you would take an exception.

Mr. SPAULDING: And may I have 30 days in which to prepare a bill of exceptions?

The COURT: Very well.

BE IT FURTHER REMEMBERED, That thereafter and on the 23rd day of November, 1935, the Court found the defendant guilty and sentenced him to pay a fine of One Hundred Dollars ($100.00), and that he be confined in jail for a period of sixty

days, and thereupon suspended said sentence, and placed said defendant on probation for a period of three years. That thereafter and on the 23rd day of November 1935, on motion of Mr. A. C. Spaulding, the Court granted the defendant thirty days in which to prepare and serve his bill of exceptions herein.

And now, within the time allowed by law, and as granted by the Court, defendant presents this his proposed bill of exceptions, and asks that the same may be signed, settled and allowed as true and correct.

C. A. SPAULDING
Attorney for Defendant.

Service of the foregoing Bill of Exceptions by acceptance of a true copy thereof is hereby acknowledged this 10th day of December, 1935.

R. LEWIS BROWN
Asst. U. S. Attorney,
Attorney for Plaintiff.

In accordance with Stipulation of Counsel heretofore filed in this Court, the foregoing Bill of Exceptions is hereby settled and allowed this 17th day of December 1935.

CHARLES N. PRAY,
Judge.

[Endorsed]: Lodged in Clerk's office Dec. 10, 1935. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

Filed Dec. 17, 1935. C. R. Garlow, Clerk. By C. G. Kegel, Deputy.

Thereafter, on November 30, 1935,

NOTICE OF APPEAL

was filed herein, being in the words and figures following, to wit: [11]

[Title of Court and Cause.]

The name and address of appellant is A. R. Mitton, Poplar, Montana.

The name and address of appellant's attorney is C. A. Spaulding, Helena, Montana.

The offense charged against appellant is that of selling to Indians, wards of the United States Government, and of possessing on Indian territory, beer of an alcoholic content of 3.2 by weight.

That the date of the judgment rendered against appellant is November 23rd, 1935.

That the judgment or sentence under the two counts of the indictment not dismissed by the United States Government was that defendant be fined One hundred Dollars ($100.00) and given a punishment of sixty days in jail, which sentence was by the Court suspended. That the defendant is not confined in jail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

A. R. MITTON
Appellant.
By C. A. SPAULDING
Attorney for Appellant.

Dated November 29th, 1935.

C. A. SPAULDING,
Attorney for Appellant. [12]

Grounds of the appeal above made are:

That the sale to an Indian, a ward of the Government, of beer of an alcoholic content of three and two tenths per cent by weight, or possession in Indian territory of beer of an alcoholic content of three and two tenths per cent by weight is not in controvention of any law of the United States, nor forbidden by any of such laws, an intoxicating liquor, and has been so declared by the laws of the State of Montana, and by the act of Congress authorizing the manufacture, sale and transportation of such beer. [13]

[Title of Court.]

United States of America,
State of Montana,
County of Lewis and Clark.—ss.

C. A. Spaulding, being duly sworn, deposes and says:

That he is the Attorney for the Appellant named in the attached and foregoing notice of appeal. That on the 29th day of November, 1935, he mailed a copy of the said attached notice to Lewis Brown, Assistant United States District Attorney for the District of Montana, at the City of Helena, Montana, with postage fully prepaid and addressed to the said Lewis Brown, Assistant United States District Attorney, at Great Falls, Montana, and also a copy addressed to the said Lewis Brown, Assistant United States District Attorney, at Butte, Montana. That between said City of Helena, Montana, and

said City of Great Falls, Montana, and between the said City of Helena, Montana, and said City of Butte, Montana, there is regular United States Mail Service.

C. A. SPAULDING

Subscribed and sworn to before me, this 29th day of November, 1935.

MYLES J. THOMAS

(Seal)

Notary Public for the State of Montana. Residing at Helena, Montana. My commission expires Oct. 13, 1937.

[Endorsed]: Filed Nov. 30, 1935. C. R. Garlow, Clerk. [14]

Thereafter, on December 10, 1935, Assignment of Errors was duly filed herein, which original Assignment of Errors is transmitted with this transcript on appeal. [15]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the above named defendant and makes and files this, his Assignment of Errors. The District Court erred:

(1) In holding that the sale of beer of an alcoholic content of three and two tenths per cent by weight to an Indian, a ward of the Government, is a violation of law.

(2) In holding that possession in the Indian Country under the exclusive jurisdiction of the Uni-

ted States of beer of an alcoholic content of three and two tenths per cent by weight is a violation of law.

(3) In finding the defendant guilty under the proofs and stipulations of the parties.

WHEREFORE This defendant prays that such judgment of the said District Court may be reversed.

C. A. SPAULDING
Attorney for Defendant.

Service of the foregoing Assignment of Errors by acceptance of a true copy thereof is hereby acknowledged this 10th day of December, 1935.

R. LEWIS BROWN,
Asst. U. S. Atty.
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 10, 1935. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

Thereafter, on January 6th, 1936, Praecipe for Transcript of Record was duly filed herein, being in the words and figures following, to wit: [16]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Honorable C. R. Garlow, Clerk of the District Court of the United States of the District of Montana:

YOU ARE HEREBY REQUESTED to prepare and certify to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, transcript on appeal in the above

entitled case. The defendant hereby designates and indicates the portion of the records, papers and files to be incorporated in the transcript on appeal, as follows:

1. Indictment, Counts 1 and 17.
2. Minutes of Plea.
3. Judgment of Court.
4. Bill of Exceptions.
5. Stipulation for Settlement of Bill of Exceptions.
6. Notice of Appeal.
7. Assignment of Errors.
8. This praecipe.

C. A. SPAULDING
Attorney for Defendant.

Service of the foregoing praecipe acknowledged and copy received this 6th day of January, 1936.

U. S. Attorney
R. LEWIS BROWN
Assistant U. S. Attorney

[Endorsed]: Filed Jan. 6, 1936. C. R. Garlow, Clerk. [17]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby

certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 17 pages, numbered consecutively from 1 to 17 inclusive, together with the original Bill of Exceptions and the original Assignment of Errors, transmitted herewith, constitutes a full, true and correct transcript of the record and proceedings, called for by praecipe, in case No. 5601, United States vs. A. R. Mitton, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript of record amount to the sum of Eight and 20/100 Dollars ($8.20), and have been paid by the appellant.

WITNESS my hand and the seal of said court at Helena, Montana, this January 25th, A. D. 1936.

(Seal) C. R. GARLOW
Clerk. [18]

[Endorsed]: No. 8089. United States Circuit Court of Appeals for the Ninth Circuit. A. R. Mitton, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed January 28, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals

For the Ninth Circuit

No. 8089

Brief for Appellant

A. R. MITTON,

Appellant.,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

Upon Appeal from the District Court of the United States for the District of Montana.

HONORABLE CHARLES N. PRAY, Judge

C. A. SPAULDING,
Attorney for Appellant.

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United States Circuit Court of Appeals

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No. 8089

Brief for Appellant

A. R. MITTON,

Appellant.,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

Upon Appeal from the District Court of the United States for the District of Montana.
HONORABLE CHARLES N. PRAY, Judge

STATEMENT OF THE CASE.

This is an appeal from a judgment following conviction of appellant of the offense of a sale of beer to an Indian, a ward of the Government, and the unlawful possession by him of beer on an Indian Reservation, all in violation of Section 241 Title 25 of the United States Codes Annotated. Appellant was indicted in the District Court of the United States for the District of Montana on

the 14th day of July, 1934, (Tr. 2-4); arraigned and pleaded not guilty on November 23rd, 1935, (Tr. 4-6); brought to trial on the same day, and convicted and sentenced on that day, (Tr. 4-6). Appellant was sentenced to sixty days imprisonment and fined the sum of One Hundred Dollars (Tr. 4-6). From this judgment he has appealed to this Court. (Tr. 15-16).

THE ISSUES

The questions involved are:

1. Is the sale to an Indian ward of the government of beer of an alcoholic content of 3.2 per centum by weight a violation of Section 241 Title 25 of the United States Codes Annotated?

2. Is the possession in the Indian Country under the exclusive jurisdiction of the United States of beer of an alcoholic content of 3.2 per centum by weight a violation of Section 241 Title 25 of the United States Codes Annotated?

3. Can the conviction of appellant of the crime charged in the indictment be sustained upon the proofs and stipulations of the parties found in the record?

ASSIGNMENT OF ERRORS

The District Court erred:

1. In holding that the sale to an Indian of beer of an alcoholic content of 3.2 per centum by weight is a violation of Section 241 Title 25 of the United States Codes Annotated.

2. In holding that the possession in the Indian

country, under the exclusive jurisdiction of the United States, of beer of an alcoholic content of 3.2 per centum by weight is a violation of Section 241 of Title 25 of the United States Codes Annotated.

3. In finding appellant guilty of a violation of Section 241 of Title 25 of the United States Codes Annotated under the proofs adduced on the trial and the stipulations of the parties.

BRIEF OF THE ARGUMENT

THE STATUTE AND ITS MEANING.

The three assignments of error in this case may appropriately be considered together inasmuch as they all challenge the holding of the trial court that the possession in the Indian country of beer of an alcoholic content of 3.2 per centum by weight is a violation of Section 241, Title 25 of the United States Codes Annotated, and that the sale of beer of like alcoholic content to an Indian, a ward of the Government, is likewise a violation of said Section 241.

Upon the trial of this cause it was stipulated not only that the indictment was drawn under said Section 241 Title 25 USCA, but that the "beer" referred to therein, both as to sale and possession, was beer of an alcoholic content not greater than 3.2 per centum by weight (Tr. 9-10). It was also stipulated on the trial that the beer so sold and possessed was beer of an alcoholic content authorized to be sold by Chapter 106 of the Session

Laws of 1933 of the Legislative Assembly of the State of Montana, as amended by Chapter 46 of the Laws of the Extraordinary Session of the said Legislative Assembly (Tr. 10-11). All counts of the indictment except those number 1 and 17 were dismissed on the trial on motion of the District Attorney (Tr. 11). These counts, 1 and 17 respectively, charge sale and possession of beer. (Tr. 2-4).

Section 241 Title 25 USCA reads as follows:

> "TRAFFIC IN INTOXICATING LIQUORS.
> 241. Intoxicating liquors; sale to Indians or introducing into Indian country. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than $300 for each offense.
>
> Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship, and any person who shall introduce any malt,

> spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than $100 for the first offense and not less than $200 for each offense thereafter: *Provided, however,* That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department."

The position of this appellant is that the design and the only design, and the purpose and the only purpose of Congress in enacting Section 241 was to prevent the sale to Indian wards of the Government and the introduction into the Indian country of intoxicating liquor. If this be the design and the purpose of Section 241, then the introduction into the Indian country, or the sale to an Indian, a ward of the Government of non-intoxicating beverages is not within the purview of nor prohibited by said Section 241; and this without regard to whether such beverages bear the name "beer" or are malt beverages whatever their name if non-intoxicating in character. This position is sustained by the statute itself. Section 241 is found in USCA under the heading "Traffic in Intoxicating Liquors," and only a strained, not to say wholly unjustifiable, construction of the Section

can warrant the conclusion that Congress intended to prohibit the sale to the Indian of beer containing no alcohol. The context clearly indicates that the word "beer" as used in the statute means only beer of an intoxicating character. The first reference to "beer" in Section 241 is the provision that

> "No ardent spirits, ale, beer, wine *or intoxicating liquor or liquors of whatever kind* shall be introduced under any pretext into the Indian country."

The next reference to "beer" in Section 241 is the provision that

> "Every person who sells, exchanges, gives, barters or disposes of any ardent spirits, ale, beer, wine *or intoxicating liquors of any kind* to any Indian * * * * shall be punished" *et cetera.*

The next reference to "beer' in said Section 241 provides that

> "Any person who shall sell, give away, dispose of, exchange or barter any malt, spirituous or vinous liquor including beer, ale and wine or any ardent *or other intoxicating liquor of any kind whatsoever,* or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever under any name, label or brand *which produces intoxication,* to any Indian a ward of the Government under the charge of any Indian Superintendent or agent or any Indian, including mixed bloods over whom the Government through its departments exercises guardianship, and any person who shall introduce or attempt to introduce any malt, wine, or any ardent or *intoxicating liquor of*

any kind whatsoever into the Indian country, shall be punished" *et cetera.* (Italics mine.)

It will be observed from the foregoing excerpts from Section 241 that the term beer used therein is invariably, in one form or another, associated with the phrase "or other intoxicating liquor or liquors." This is significant and from a legal standpoint of consequence here. The doctrine of *noscitur a sociis* irresistibly impels one to the conclusion that Congress in using the term beer in Section 241 invariably in connection with the phrase "or other intoxicating liquor" had reference to beer as an intoxicating liquor. The language of Section 241 and observations similar to those above set forth constrained counsel for the Government in the court below to take the position that whether beer contained any alcohol whatever its sale to an Indian, a ward of the Government, or its possession in the Indian country was unlawful. This doubtless will be the contention here. This seems to the writer to reduce the statute to an absurdity. Certainly Congress in enacting Section 241 was not engaged in an attempt to keep beverages from the Indian which possessed no intoxicating properties. If that was the intent of Congress what reason existed for placing Section 241 under a heading of "Traffic in Intoxicating Liquors," and why should the word beer be always connected in the statute with "other intoxicating liquors"?

Furthermore, in enacting this statute was Con-

gress attempting to keep intoxicating beverages from the Indian, or was it attempting to prevent the Indian from the use of harmless and non-intoxicating beverages? To ask the question is to answer it. Congress was not concerned with the consumption by the Indian of soda pop or ginger ale. If it had been, those terms would appear in the statute. Hence it is earnestly and seriously urged by this appellant that not only by the words employed in the statute and their associate words, but by the plainest principles of legislative intent deducible from the statute itself, and the reasons underlying its enactment, the term beer used in Section 241 means beer of an intoxicating character.

IS BEER OF AN ALCOHOLIC CONTENT OF 3.2 PER CENTUM BY WEIGHT INTOXICATING?

If Section 241 only prohibits the sale to Indians or possession in the Indian country of "intoxicating" beverages, then it becomes pertinent to inquire whether beer of an alcoholic content of 3.2 per centum by weight is intoxicating, or to speak accurately, whether it has been legislatively declared to be non-intoxicating. That Congress has so declared is evidenced by the Act of Congress of March 22nd, 1933 authorizing the manufacture, sale, possession and transportation of beer of an alcoholic content of not more than 3.2 per centum by weight.

That Act of Congress is found in United States Statutes at Large, Volume 48, Part 1, Chapter 4,

Page 16. It is entitled "An Act to provide revenue by the taxation of certin non-intoxicating liquors, and for other purposes."

> "Nothing in the National Prohibition Act as amended shall apply to any of the following nor to any act nor failure to act in respect to any of the following containing not more than 3.2 per centum of alcohol by weight: Beer, ale, porter, wine, similarly fermented malt or vinous liquor or fruit juice."

The title as well as the body of this Act is conclusive that Congress in passing it legislatively declared that beer containing not more than 3.2 per centum alcohol by weight is non-intoxicating. This legislative declaration is binding on the courts. It follows that if Section 241 Title 25 USCA was enacted for the purpose of preventing the sale to the Indian or the possession in Indian country of liquor of an intoxicating character the legislative declaration that such beer is non-intoxicating permits its sale to the Indian and possession in the Indian country.

As additional evidence that Congress considered and legislated that beer containing not more than 3.2 per centum of alcohol by weight was non-intoxacting is the fact that the Act of March 22nd, 1933 was enacted before the repeal of the 18th amendment. The 18th Amendment absolutely prohibited the manufacture, sale, possession or transportation of intoxicating liquor. It reads:

> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the im-

> portation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

With this Amendment in force it was beyond the power of Congress to provide for the manufacture, sale or transporation of any "intoxicating" liquor.

As was pertinently observed by the Supreme Court of the United States in National Prohibition Cases, 253-350, 40 S. Ct. 486, 64 L. Ed. 946:

> "The first section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

Not only was this Amendment in full force, but acting under the power conferred thereby, Congress had enacted the National Prohibition Act, which likewise on March 22nd, 1933 was in full force.

That Act provided, so far as we are here concerned, that:

> "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this charpter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

With these sweeping and general prohibitive provisions of the National Prohibition Act in full force Congress passed this Act of March 22nd, 1933, declaring such provisions should not apply to beer of an alcoholic content not greater than 3.2 per centum by weight. The National Prohibition Act does not mention beer by name, but did at that time and for some time afterward absolutely prohibit the manufacture, sale, transportation and possession of "intoxicating liquor." Congress, therefore, in passing the Act of March 22nd, 1933 was designedly legislatively declaring that beer did not fall within the term "intoxicating liquor."

In this connection it should be borne in mind that under the Eighteenth Amendment Congress had the power to define Intoxicating liquor. This power was upheld in the case of Rhode Island vs. Palmer, 253 U. S. 350; 64 L. Ed. 946. In that case the court said:

> "While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provisions of the Volstead Act (title II. Par. 1), wherein liquors containing as much as 1/2 of 1 per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power. Jacob Ruppert vs. Caffey, 251 U. S. 264, ante, 260, 40 Sup. Ct. Rep. 141."

Following the admitted power referred to by the Supreme Court, Congress changed the defini-

tion of intoxicating liquor on March 22nd, 1933, by exemptnig from the National Prohibition Act, beer, wine, ale and other liquors containing not more than 3.2 per centum of alcohol by weight. (27 USCA 64 a) This became the new definition of intoxicating liquor under the several statutes of the United States, as effectively as did the original provisions under Section 4, Title 27, USCA.

Sub-committees of the House and Senate held lengthy hearings on the proposed amendments permitting 3.2 beer.

Before the Senate Sub-committee, this explanation was given by Hon. William H. Hull, a Representative in Congress from Illinois:

> "The Supreme Court of the United States, in deciding the case Ruppert versus Caffey, said that Congress had the right for the purpose of regulation to establish the arbitrary standard of one-half of 1 per cent in order to make the eighteenth amendment effective. It was clearly admitted, however, that Congress had an equal right to change this standard so long as it did not transcend the language and the intent of the eighteenth amendment in prohibiting the manufacture, transportation, and sale of beverages that are actually intoxicating.
>
> "The definition of an intoxicating liquor in the national prohibition act is conceded to be arbitrary and incorrect and it is not even attempted by the Government to uphold it as a definition."

and on page 61 the following:

> "Senator Bulkley. I would like to know how they arrived at exactly 3.2 per cent as the most desirable amount. I understand that

you say that it would make a more satisfactory drink than 2.75. Why do you fix that at 3.2?

Mr. Hull. I took the 3.2 per cent because that is what the Scandinavian beers are fixed at, and we are talking about non-intoxicating beers, and the Scandinavian beers are non-intoxicating.

Senator Bulkley. They tried to get as large a percentage of alcohol as they could without its being intoxicating?

Mr. Hull. Yes. And that is the reason that I followed their course.

Senator Bulkley. Experience bears that out?

Mr. Hull. Experience bears that out."

The repeal of the Eighteenth Amendment was not accomplished until December 5th, 1933, hence it was in full force and effect when the statute above adverted to of March 22nd, 1933, was enacted. The courts take judicial notice of the date of the repeal of the Eighteenth Amendment. It was so held in the case of United States vs. Chambers, 78 L. Ed. 763 where the Supreme Court of the United States, speaking through Chief Justice Hughes, said:

> "This Court takes judicial notice of the fact that the ratification of the Twenty-first Amendment of the Constitution of the United States, which repealed the Eighteenth Amendment, was consummated on December 5, 1933. Dillon v. Gloss, 256 U. S. 368, 65, L. Ed. 994, 41 S. Ct. 511."

In addition to the foregoing the Legislative Assembly of the State of Montana had prior to the Act of Congress of March 22nd, 1933, declared beer

of an alcoholic content of not more than 3.2 per centum by weight to be non-intoxicating. This Act was approved March 14th, 1933 and is found in the Session Laws of Montana of the Twenty-third Session, Chapter 106. Section 4 provides:

> "Beer containing one-half of one per cent (½%), or more, of alcohol by volume and not more than three and two-tenths (3.2%) of alcohol by weight, or beer of an alcoholic content declared by the Congress of the United States to be non-intoxicating, is hereby declared to be non-intoxicating and may be manufactured and/or sold or transported in and into this state, or possessed therein, in the manner and under the conditions prescribed in this Act and not otherwise."

This Act was also passed at a time when the Eighteenth Amendment and the National Prohibition Act were infull force and effect. This language of Section 4 "or beer of an alcoholic content declared by the Congress of the United States to be non-intoxicating," is significant. Congress had not when this state statute was enacted passed the Act of March 22nd, 1933; but immediately the Act of Congress did pass on March 22nd, 1933 the Beer Act of Montana above referred to went into effect. In other words the going into effect of the Act of Congress of March 22nd, 1933 made immediately effective the Montana Act dependent as it was on Congress declaring beer of an alcoholic content of 3.2 per centum by weight non-intoxicating.

From the foregoing it would seem to be indis-

putable that both the Congress and Legislative Assembly of the State of Montana have legislatively declared beer containing not more than 3.2 per centum by weight to be non-intoxicating.

IS IT UNLAWFUL TO SELL TO AN INDIAN OR POSSESS IN THE INDIAN COUNTRY ANY BEVERAGE CALLED "BEER" CONTAINING NO ALCOHOL WHATEVER?

Counsel for the Government contends that this inquiry must be answered in the affirmative; that the use of the term "beer" in Section 241 prohibits the sale of such beverage without regard to alcoholic content or intoxicating properties. It has been held otherwise under statutes very like Section 241.

In the case of Bowling Green vs. McMullen, 134 Ky., 743, 26 L. R. A. (N. S.) 895, 122 S. W. 823, the court said:

> "As intimated in the Anderson Case, supra, there is grave question as to the power of the legislature to enact a law prohibiting the sale of liquids that are not intoxicants, and not in their make-up detrimental to health or the peace or good weal of society, although they may contain malt or spirituous or vinous liquors. The legislature, when framing the Cammack law, put this construction upon these words 'spirituous, vinous, malt or other intoxicating liquors,' meaning plainly that the inhibition was to cover and include all intoxicating drinks. If not, why use the words, 'or other intoxicating liquors?' "

In the case of People vs. Stickler (Cal.) 142 Pac.,

1121 the statute under which defendant was prosecuted provided:

> "The term 'alcoholic liquors" as used in this act, shall include spirituous, vinous and malt liquors and any other liquor or mixture of liquors which contain 1 per cent. by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage."

The court said:

> "The contention of the defendant is that, inasmuch as the information declares that the malt liquors, which the alleged illicit keeping and selling of which he is charged, contained a less quantity of alcohol than that specified in Section 21 of said act as applied to "any other liquor or mixture of liquors," etc., to-wit, 1 per cent, by volume, or more, no offense under said law is stated against him. The argument is that the general language of Section 21, to-wit, "and any other liquor or mixture of liquors," etc., must be examined by the light of the maxim, noscitur a sociis, and that, as so viewed, it must be held that the provisions as to the quantity of alcohol that must be present in such liquors to bring them within the interdictions of the statute, includes those liquors ejusdem generis, specially enumerated by the language immediately preceding it.
>
> "The position of the Attorney General is that the special language of said section is not qualified or in any degree controlled by the general language thereof, but that, by the specific enumeration in said section of spirituous, vinous, and malt liquors, the Legislature intended such liquors to fall under its ban regardless of whether they do or do not in fact contain alcohol. In other words, it is the contention of the people that the intoxicating

character of "spirituous, vinous, and malt liquors," as so enumerated in the statute, has been established by the Legislature itself, and that it is not for the jury to revise the judgment of the Legislature upon that matter and so determine whether such liquors are or are not in fact intoxicating. State v. Frederickson, 101 Me. 37, 63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rept. 295, 8 Ann. Cas. 48."

"We are still of the opinion, however, that the Legislature did not intend to make it unlawful for one to engage in the business of selling non-intoxicating liquors. In other words, it is not reasonable to suppose that it was the legislative intent to contraband the traffic in spirituous, vinous, or malt liquors possessing no intoxicating quality. To the contrary, it seems very clear, when we consider the ultimate object of the local option law, that the Legislature thus aimed the shafts of its denunciation solely against any liquors the use of which would produce intoxication, and that, by specifying the quantity of alcohol which, when used in liquors, would bring them within the condemnation of the statute, it intended to and did establish a test applicable to all liquors the sale of which was designed by the statute to be prohibited in any territory to which the law might appropriately be made applicable. This conclusion is arrived at by a view of Section 21 of the act by the light of the rule of construction, ejusdem generis, above referred to. In its practical application, this rule simply means that:

"General and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restriced to a sense analogous to the less general. 3 Words and Phrases Judicially Defined, p. 2328."

In the case of Abbott vs. State 11 Ga. App. 43,

74 S. E. 621 a statute was under consideration prohibiting the sale of "any alcoholic, spirituous, malt or intoxicating liquors, or other drinks *which if drunk to excess will produce intoxication.*" The court held that the determinative question was whether the liquor sold was of a kind "which if drunk to excess" would produce intoxication; in other words, that the concluding language of the statute qualified and gave meaning to the antecedent specific enumerations found therein.

But the matter of what construction should be given to a statute such as Section 241 has been set at rest by the decision of the Supreme Court in the case of United States vs. Standard Brewery 251 U. S. 510; 64 L. Ed. 229. There the defendants were charged with unlawfully using certain grains, etc., in the manufacture of beer for beverage purposes, which contained one-half of one per cent of alcohol by weight and volume. The defendants prevailed on a demurrer to the indictment. The prosecution arose out of the proclamation of President Wilson prohibiting the use of grain or cereal for manufacture of certain beverages. The act of Congress, out of which the President's power gave rise provided:

> "No grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes."

The Attorney General contended that it was the

intention to prohibit all beverages commonly known as beer.

The judgments were affirmed. In part the Court said:

> "The prohibitions extend to the use of food products for making "beer, wine, or other intoxicating malt or vinous liquors for beverage purposes." These provisions are of plain import and are aimed only at intoxicating beverages. It is elementary that all of the words used in a legislative act are to be given force and meaning (Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 25 L. Ed. 782, 783); and of course the qualifying words "other intoxicating" in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them, or that it did so without intending that they should be given due force and effect. The government insists that the intention was to include beer and wine, whether intoxicating or not. If so, the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words."

This effectively disposes of the view taken by some state courts that the mere use of the word "beer" in a statute prohibits its sale regardless of alcoholic content. The views expressed by the Supreme Court in the case last cited are not only sound in principle, but find support in the common sense reason that all legislation of this character is intended to correct and prevent the evil of intoxication, and not to prohibit the consumption of a beverage because it bears a particular name. If Section 241 was intended to prevent the

sale of "malt" and "beer" regardless of alcoholic content, its provisions were violated by the sale of one-half of one per cent beer during the time the National Prohibition Act was in force. The fact that no arrests were ever made by Government authorities for such sales to Indians is very persuasive that the holding of the trial court in this case was erroneous and that a reversal of that holding is here required.

All of which is very respectfully submitted,

C. A. SPAULDING,
Attorney for Appellant.

No. 8089

United States Circuit Court of Appeals

For the Ninth Circuit

A. R. MITTON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

Upon Appeal from the District Court of the United States for the District of Montana.

HONORABLE CHARLES N. PRAY, Judge.

JOHN B. TANSIL,
Attorney of the United States in and for the District of Montana.

R. LEWIS BROWN,
Assistant Attorney of the United States, in and for the District of Montana.

Attorneys for Appellee.

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STATEMENT

The appellant was convicted on two counts of a violation of Section 241 of Title 25, U. S. C.., which provides, where material:

> "241. Intoxicating liquors; sale to Indians or introducing into Indian country. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of the Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than $300 for each offense.
>
> "Any person who shall sell, give away, dis-

> pose of, exchange, or barter any malt, spirituous, or vinous liquor including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Goverment through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall be punished * * *."

The appellant was convicted under the first count for sale to an Indian ward of the Government under the charge of the superintendent in charge of the Fort Peck Indian Reservation, in the state and district of Montana, and on the other count of an introduction upon the Fort Peck Reservation of liquor prohibited by the section.

The action was tried to the court without a jury upon stipulated facts, the facts stipulated showing that the appellant introduced and sold to the Indian ward beer of an alcoholic content of 3.2 by weight.

ARGUMENT

EFFECT OF SECTION 241, TITLE 25.

Upon appeal, the appellant argues that sale to an Indian ward, or introduction upon a reservation of

beer of an alcoholic content of 3.2 per cent by weight is not a violation of Section 241 because of the fact that the section prohibits only the sale or introduction of intoxicating beer, and that by legislative enactments, both of Congress and of the legislature of the state of Montana, beer of an alcoholic content of 3.2 has specifically been declared to be non-intoxicating.

The contention of the government is that the word "beer," as used in the section by Congress, was used in its ordinary and accepted meaning and in the common understanding of the word, and that the sale of beer to an Indian ward, or its introduction upon an Indian Reservation is prohibited and made an offense under the section.

The contentions here made require a construction of the statute and certain rules of construction may be of aid in the solution of the question.

In seeking the meaning of a statute, resort must first be made to the language of the statute:

United States v. Standard Brewery,
251 U. S. 210, 217;
Caminetti v. United States, 242 U. S. 470.

The intent and meaning of the legislature must be ascertained from the language of the act, and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used:

Magnano Company v. Hamilton,
292 U. S. 40, 47.

This must be done whatever may have been in the minds of individual members of Congress:

Merritt v. Welsh, 104 U. S. 694.

The entire language of the statute must be examined.

McBroom v. Scottish Investment Company, 150 U. S. 318.

If that language is plain and as so construed, the law is within the power of Congress, the sole function of the courts is to enforce it according to its terms.

Caminetti v. United States, Supra.

A brief history of the legislation of Congress concerning the traffic in liquor with the Indian may be of aid in determining the question presented. From a reading of the acts of Congress on the subject, Congress has never attempted to regulate that traffic, its entire aim for more than 100 years has been to the absolute suppression of the traffic. The first permanent law enacted by Congress to that end was an act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontier, approved March 30, 1802 (2 Statutes 146), Section 21 of that act authorizing the President to take such measurements from time to time as to him might appear expedient to prevent the vending or distribution of spirituous liquors among all or any of the Indian tribes. Various other enactments were made by Congress between that time and July 9, 1832,

when the act of that date (4 Statutes 564) was passed, Section 4 declaring that no ardent spirits shall be hereafter introduced under any pretense into the Indian country. The statute remained substantially the same until the act of February 13, 1862 (12 Statutes 388) was passed imposing punishment upon anyone who should sell, exchange, barter, or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian suprintendent or Indian agent appointed by the United States whether such sale was made in the Indian country or not. The act of March 15, 1864 (13 Statutes 29) prohibited the selling of spirituous liquors and wines to an Indian under the charge of the superintendent or agent.

It will be noted that the early act prevented the sale, etc. of spirituous liquors only. After the act of 1862, it prevented the sale etc. of spirituous liquor and wine, thus adding wine to the spirituous liquor, formerly prohibited.

In United States v. 43 gallons of whiskey, etc., 93 U. S. 192, Mr. Justice Davis prefaced his opinion in that case with the following observation:

> "It may be that the policy of the government on the subject of Indian affairs has, in some particulars, justly provoked criticism; but it cannot be said, that there has not been proper effort, by legislation and treaty, to secure Indian communities against the debasing influence of spirituous liquors. The evils from this source were felt at an early day; and, in order to promote the welfare of the Indians, as well as our

political interests, laws were passed and treaties framed, restricting the introduction of liquor among them. That these laws and treaties have not always secured the desired result, is owing more to the force of circumstances which the government could not control, than to any unwillingness to execute them.

"Traffic with Indians is so profitable, that white men are constantly encroaching on Indian territory to engage in it. The difficulty of preventing this intrusion, and of procuring convictions for offenses committed on the confines of civilization, are the obstacles in the way of carrying into effect the intercourse laws. It is doubtless true, that they are as well executed as could be expected under the circumstances. In this case, the United States, in its endeavors to enforce them, is met with the objection, that they do not apply to the country in which the liquor was seized."

The profit to be made by the whites in the traffic with the Indians, as commented on by Mr. Justice Davis, was such as to cause the ingenuity of the white trader to circumvent the spirit of the act while conforming to its letter by selling beer and other intoxicants to the Indians that were not prohibited by the act. Thus in In Re McDonough, 49 Fed. 360, the District Court of Montana held that beer, not being a spirituous liquor, was not within the meaning of the act and that no prosecution could be maintained under it for one selling beer to the Indians.

The Supreme Court in Sarlls v. United States, 152 Fed. 570, held that lager beer was not a spirituous liquor nor wine, within the meaning of the act and

cited with approval the decision of the District Court in In Re McDonough, Supra.

Congress then in 1892 (27 Statutes 260), still pursuing its undeviating aim from the year 1802 to absolutely suppress the liquor traffic among the Indians and not to regulate it, passed the present act and specifically included in it "beer." '

From a reading of the history of the act it cannot be doubted that when Congress, in 1892, amended the act to include beer, that it did so for the express purpose of putting something into the act that had not been in any previous acts and for the specific purpose of changing the statute in that regard. It cannot be considered that Congress changed the act for no purpose, or to accomplish no end.

That it did make a substantial change in the act cannot be doubted. Thus in the Sarlls case, Supra, the Supreme Court says at page 576 of Volume 152 U. S.:

> "Since this cause was tried, an amendatory act has been passed by Congress approved July 23, 1892 * * * providing that the section shall read as follows:
>
> " 'No ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind shall be introduced under any pretense into the Indian country. Every person who sells * * * any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian * * *.'
>
> "This would seem to show that Congress regarded the act, as it previously stood, as not in-

> cluding ale and beer in its terms. At any rate, the temptation to the courts to stretch the law to cover an acknowledged evil is now removed."

The Supreme Court said in United States v. Wright, 229 U. S. 226 at 229, in speaking of the change:

> "Section 2139, Revised Statutes, providing for the punishment of persons introducing liquor into the Indian country, traces its origin to Section 20 of the Indian Intercourse Act of June 30, 1834, c. 161, 4 Statutes 729, 732, as amended by the act of March 15, 1864, c. 33, 13 Statutes 29. The amendment of 1892 (set forth in 225 U. S. 671) extended the prohibition to include ale, beer, and intoxicating liquors of any kind as well as ardent spirits and wine, * * *."

The Circuit Court of Appeals for the Eighth Circuit, in United States Express Company v. Friedman, et al., 191 Fed. 673, in commenting upon the history of the act and the change made by the amendment of 1892, says at page 677:

> "This law wrought several changes. It extended the prohibition to all mild, spirituous and vinous liquors including beer, ale and wine, and any ardent or other intoxicating liquor of any kind whatsoever, and any essence, extract, bitters, preparation, compound, composition, or any article whatsoever under any name, label, or brand, which produces intoxication."

It will here be noted that none of the various courts, in speaking of the change wrought by the amendment of 1892, in any wise infer that the change was to include beer, ale and wine of an intoxicating nature, or to exclude beer, ale, or wine of a non-intoxicating nature. The courts say that the change was

including beer, ale and wine without qualifications as to the degree of the intoxicating properties of each.

Neither can the words "or intoxicating liquor or liquors," that appear in the act, be construed to be words of limitation upon the preceding words used, as they must be if appellant's contention is to be adopted, that is that the words "ale," "beer" and "wine" are limited to such ale, beer and wine as the proof at a trial might show to be intoxicating. Rather, would it seem to be the true construction in the light of the history of the act and the aim of Congress as declared by the courts, and the language of the courts in commenting upon the change wrought by the amendment of 1892 that the words, "or intoxicating liquor or liquors of whatever kind," were not meant to be a limitation, but were meant to be all inclusive and to broaden the act to the extent that if anything fit for human consumption were thereafter made containing alcohol sufficient to intoxicate, the same could not be sold to the Indians. Congress enacted the amendatory act in light of the knowledge that acts theretofore passed by it to suppress the traffic in liquor with the Indians had been circumvented because it had, in the previous acts, used language that was not all inclusive, but that embraced only spirituous liquor and wine and that by reason thereof, other intoxicating liquors had been sold to the Indians by the whites without pun-

ishment, and, therefore, amended the act so as to provide that certain characters of liquor, such as spirituous, and also certain designated liquors such as ale, beer and wine, should not be sold to the Indians, and then to the end that this act be not circumvented by selling something in fact intoxicating, but not mentioned in the act, added the language "or intoxicating liquor or liquors of whatever kind," so that the act would cover the sale of any beverage containing sufficient alcohol to intoxicate. That this was the purpose of Congress and that the language served the purpose is well demonstrated by the fact that for forty-four years the act has not needed amendment in any substantial particular and stands on the books today substantially as it was then enacted, without change, and has prevented the traffic in liquor with the Indians as effectually as any act that could have been passed would have done.

That beer had as common and accepted a meaning as whiskey, rum, or wine had at the time it was used cannot be doubted. And as it is a rule of construction that language is presumed to be used in its common and accepted sense, it then is material to determine just what the word "beer" meant when it was used in the statute.

The Supreme Court in Sarlls v. United States, Supra, says at page 572 of 152 U. S., that malt liquor is defined by the Century Dictionary as:

"A general term for alcoholic beverage pro-

> duced merely by the fermentation of malt, as opposed to those obtained by distillation of malt or mash."

and further says:

> "So far, therefore, as popular usage goes, according to the leading authorities, 'lager beer,' as a malt liquor made by fermentation, is not included in the term 'spirituous liquor', the result of distillation."

The Supreme Court of Arkansas, in Williams v. State, 77 S. W. 597, says:

> "But the primary meaning of the word 'beer' is a malt and fermented liquor containing more or less alcohol * * *. There is a secondary sense in which the word 'beer' is used to describe certain non-alcoholic beverages as root or persimmon beer, but when so used it is generally preceded by a word descriptive of the kind of beer referred to as persimmon beer, root beer, and the like. When the word 'beer' is used alone, without descriptive word, it is generally, almost universally, taken as referring to the malt liquor sold under that name, and there are many decisions upholding convictions on such testimony. Black on Intoxicating Liquor Section 17 and cases cited."

Appellants contention is that because Congress used the words "ale, wine and beer" and then the all embracive "or intoxicating liquor or liquors of whatever kind," that by so doing, Congress by the use of the word "beer," meant beer intoxicating in character. In other words, that by the use of the words "or intoxicating liquor or liquors of whatever kind," Congress meant some other or different kind of beer

than if in writing the statute, it had said "ale, beer and wine" and stopped there without including the other language.

It would seem that this contention of the appellant cannot be sustained, if his argument were otherwise sound and the words were words of limitation, in view of the decision of the Supreme Court in Hollender v. Magone, 149 U. S. 586. The Supreme Court saying at page 589:

> "In the first place the word 'liquors' is frequently, if not generally, used to define spirits or distilled beverages in contradistinction to those that are fermented. Thus, in the Century Dictionary, one of its definitions is 'An intoxicating beverage, especially a spirituous or distilled drink, as distinguished from fermented beverages, as wine and beer.' See also State v. Brittain, 89 N. C. 574, 576, in which case the court said: 'The proof was that the defendant sold liquors, and it must be taken that he sold spirituous liquors. Most generally the term liquors implies spirituous liquors.'"

Again at page 591, the Supreme Court says:

> "As there are several words of description, apparently beverages of different character were intended by each. If, for instance, in any clause we should find the two terms 'wines' and 'distilled spirits,' we should believe that some different article was intended by each term. So, if we should find the phrase 'wines and liquors,' or 'wines or liquors,' is it not a proper inference that some other kind of beverage than wine was intended by the word 'liquors'? Obviously, as it seems to us, the word is used here in a special, rather than a general sense; and when

> so used in a special sense, it is almost invariably used to define spirituous rather than malt liquors. Seldom is it used alone to define malt liquors, as contradistinguished from those that are spirituous and distilled."

Thus in the light of the foregoing decision, it will appear conclusively that by the use of the words "intoxicating liquor or liquors" the reference was to liquor other than beer.

Again, if we follow the contention of the appellant in his brief, that by the use of the words "intoxicating liquor or liquors," Congress meant beer that intoxicated, then by the use of the words "ardent spirits," Congress meant ardent spirits that intoxicated. Such leads to an absurdity, as no spirit is an ardent spirit unless it does intoxicate. Following the contention further by the use of the language "or intoxicating liquor" and "wine," it meant wine that intoxicated, or by the use of the word "ale" and "intoxicating liquor," it meant ale that was an intoxicating liquor, which leads to an absurdity for, as said by the Supreme Court in Jacob Ruppert v. Caffey, 251 U. S. 264 at 303:

> "The permission extended to all 'ale and porter' which, everyone knows, are intoxicating liquors."

Keeping in mind the aim of the government to suppress the traffic in all liquor with the Indians as evidenced by Congressional enactments since 1802 and the decisions of the courts of the United States construing them, if anything further were needed to

disclose the intent of Congress or to establish the fallacy of the appellant's contention, it is found in the opinion of the Supreme Court in Jacob Ruppert v. Caffey, 251 U. S. 264, where the court says at page 282:

> "For the legislation and decisions of the highest courts of nearly all the states establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. In other words, it clearly appears that a liquor law, to be capable of effective enforcement must, in the opinion of the legislatures and courts of the several states, be made to apply either to all liquors of the species enumerated, like beer, ale or wine, regardless of the presence or degree of alcoholic content; or if a more general description is used, such as distilled, rectified, spirituous, fermented, malt or brewed liquors, to all liquors within that general description regardless of alcoholic content; or to such of these liquors as contain a named percentage of alcohol; and often several such standards are combined so that certain specific and generic liquors are altogether forbidden and such other liquors as contain a given percentage of alcohol."

It is clear that here Congress combined several standards forbidding certain specific and generic liquors and also forbidding all others containing a sufficient percentage of alcohol to produce intoxication.

In the notes in this decision, the Supreme Court has exhaustively considered and set out the statutes of the various states where several such standards are combined together with the decisions of the courts of last resort of the various states construing their statutes and those we do not cite here as they are there fully cited by the Supreme Court.

The Supreme Court in the same case at page 288 further says:

> "The decisions of the courts as well as the action of the legislatures make it clear—or at least furnish ground upon which Congress reasonably might conclude—that a rigid classification of beverages is an essential of either effective regulation or effective prohibition of intoxicating liquors."

Appellant in his brief asserts, in support of his argument, that it was not the intention of Congress to prevent the sale of beer that contained no alcohol or no intoxicating properties.

One answer to that contention, of course, is that if beer did not contain alcohol, it would not be beer and would, therefore, not be prohibited under the act. A conclusive answer, however, to his contention, is made by the Supreme Court in Jacob Ruppert v. Caffey, Supra, where the Supreme Court says at page 289:

> "Purity Extract Co. v. Lynch, 226 U. S. 192, determined that state legislation of this character is valid and set forth with clearness the constitutional ground upon which it rests: 'When a State exerting its recognized authority under-

takes to express what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.' 'It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of "malt liquors." In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise.' 'The State, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power.' "

This reasoning applies equally well to the powers and intent of Congress in enacting legislation to

prevent the sale of liquors to the Indian wards of the government.

Again, that beer in its common, accepted term and usage was not beer unless it contained alcohol and that the courts take judicial notice that beer is the usual name for a malt liquor and that it is intoxicating, is settled by a long line of authority:

Briffitt v. State of Wisconsin (Wis.),
16 N. W. 39;
State ex rel Lyon, Attorney General v. City Club, et al (S. C.), 65 S. E. 730;
State v. Mitchell (Missouri),
114 S. W. 1113;
Moreno v. State (Texas),
143 S. W. 156;
Fulmer v. State (Texas),
29 S. W. (2d) 789;
State v. Li Fieri (Del.),
102 Atl. 77;
Hoskins v. Commonwealth (Ky.),
188 S. W. 348;
Vines v. State (Wyo.),
116 Pac. 1013;
State v. Carmody (Ore.),
91 Pac. 446.

In addition to these state authorities, the decision of the Supreme Court in the Jacob Ruppert case and the other cases we have cited impliedly so hold.

Appellant contends that the decision of the Supreme Court in the case of United States v. Standard Brewery, 251 U. S. 210, is conclusive in his favor. We do not so read the decision of the Supreme

Court. That was not a case dealing with the sale of liquor to an Indian or construing the statute now before the court. That decision dealt with the war powers of the President to prohibit the use of grains and other food stuffs in the manufacture of beverages containing more than a specified alcoholic content. The portion of the statute there under consideration is that portion which provided that:

> "No grains, cereals, * * , or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes."

The Supreme Court said at page 218:

> " 'As a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.' "

Here it will be noted that the language of the statute was not "beer," wine, or intoxicating liquor or liquors," as in Section 241, but the language of the statute in the Standard Brewery case is "beer, wine or other intoxicating **malt** or **vinous** liquor." Beer is a malt liquor, wine is a vinous liquor and the language of the statute is "other intoxicating malt or vinous liquor." In using the word "other" in connection with "intoxicating liquor" it necessarily followed that the beer and wine specifically mentioned in the statute, referred to intoxicating beer and wine, otherwise the language "other intoxicating malt liquor" would have no force and effect. To put

it in another way, when Congress said "beer or other intoxicating malt liquor," it declared the beer referred to must be intoxicating.

The language used in the Indian statute, however, is entirely different. The language there is "ardent spirits, ale, wine, beer, or intoxicating liquor or liquors." The word "other" is not used any place in conjunction with the words "intoxicating liquor" except in the first part of the second paragraph of the statute which provides:

> "Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous or vinous liquor, including beer, ale and wine, or any ardent or other intoxicating liquor of any kind whatsoever * * *."

Thus where the word "other" is used in connection with the words "intoxicating liquor," it is used immediately after the word "ardent" which, of course, is an intoxicating liquor, and refers to and modifies the word "ardent." It certainly cannot be said that the expression "other intoxicating liquor" is as much applicable to wine and beer as it is to ardent spirits or liquor and, of course, not being as applicable, it is limited to the last word referred to under this decision of the Supreme Court, that is to the word "ardent."

The purposes of the two statutes being so dissimilar, statutes themselves being so disimiliar in their language and obvious meaning, the decision relied upon by appellant is not in point here.

For years after the amendment of 1892, it was no more doubted that the language of the statute prevented the sale and importation of beer, exactly the same as it did whiskey. No contention was ever raised to the contrary. That it did, is, we think, evidenced by the fact that from the amendment to the present time, the question has never been presented to any court so far as we are able to ascertain. It would not have been presented except for the fact that appellant relies upon legislation passed during the life of the Eighteenth Amendment as an aid in enforcing that amendment in which dependent for its existence upon the contentions of the amendment in force.

SUBDIVISION II.

EFFECT OF SECTION 64a, TITLE 27, U. S. C., WHICH PERMITTED, UNTIL THE REPEAL OF THE EIGHTEENTH AMENDMENT, THE SALE OF BEER OF ALCOHOLIC CONTENT OF 3.2 PER CENT BY WEIGHT.

Appellant argues that by the enactment by Congress of Section 64a, Title 27, U. S. C. as a part of the enforcement machinery of the Eighteenth Amendment, that beer of an alcoholic content of 3.2 per cent by weight is non-intoxicating and so declared to be by Congress, and that therefore, although the beer sold was beer in the popular conception of the term, the Indian Statute here involved

was not violated because of the fact that Congress had said this beer was not an intoxicant.

There are several answers to the contention made by the appellant.

Congress in declaring that beer of an alcoholic content of 3.2 by weight to be non-intoxicating did not, of course, establish the non-intoxicating character of the beer as a matter of fact. It did only what the Supreme Court had said that legislative bodies generally within limitations, had a right to do, that is in prohibitory laws concerning liquors to adopt as a standard and prohibit the sale or possession of those liquors containing a named percentage of alcoholic content irrespective of the fact as to whether or not such percentage was or was not as a matter of act intoxicating.

Jacob Ruppert v. Caffey,
251 U. S. 264;

Rhode Island v. Palmer,
253 U. S. 350.

However, the Act of Congress amending the Volstead Act relied upon by appellant is no longer in force or effect, it was repealed by the repeal of the Eighteenth Amendment, and upon the repeal of the Eighteenth Amendment all acts passed under it, or passed with the end in view of enforcing it, were repealed and fell with it.

United States v. Chambers,
291 U. S. 217;

Massey v. United States,
291 U. S. 608;
Green v. United States,
(C. C. A. 9) 67 F. (2d) 846.

The Indian statute under consideration was a special act dealing with the Indians. Obviously, when Congress enacted the Volstead Act and laws amendatory, it was not legislating with the Indians in view, or to prevent their obtaining liquor, as the legislation on the books was already amply sufficient. Even though the act relied upon by the appellant had not fallen with the Eighteenth Amendment, but was in full force and effect, appellant's contention would still be untenable, as neither the Eighteenth Amendment nor the Volstead Act, nor the act amendatory thereof, relied upon by appellant in any manner repealed, superseded, or modified the statutes dealing with the suppression of liquor among the Indians or the Indian statute under consideration by the court.

Kennedy, et al, v. United States,
265 U. S. 344;
Browning v. United States,
(C. C. A. 8) 6 F. (2d) 801;
Cert. Den. 269 U. S. 568.

SUBDIVISION III.

EFFECT OF THE LEGISLATION OF THE STATE OF MONTANA PERMITTING THE SALE OF BEER OF ALCOHOLIC CONTENT NOT TO EXCEED 3.2 PER CENT BY WEIGHT.

Appellant finally contends that by reason of the statute passed by the legislative assembly of the State of Montana permitting the sale of beer of an alcoholic content of not to exceed 3.2 per cent that no violation of the law occurred by him in possessing and selling to the Indian ward on the Reservation.

It is certain that, as the Indian statute under which appellant was prosecuted was in no respect altered, modified, or repealed by the Act of Congress passed under the Eighteenth Amendment permitting the sale of 3.2 beer, no act of the legislative assembly of the State of Montana could in any wise affect the statute.

Aside from that, however, it is settled that Congress has the power to prohibit the traffic in liquors with its Indian wards, or upon Indian Reservations, wheresoever situate and whether the Reservations are within or without the limits of the state:

Perrin v. United States,
232 U. S. 478;

United States v. Wright,
229 U. S. 226.

It follows that the act of the legislature of the State of Montana did not in any wise attempt to regulate the traffic in liquor with Indians, that it could not have done so had it attempted to do so, and that the state statute is not only not controlling, but is entirely immaterial insofar as having any bearing upon the question here presented to the court is concerned.

We respectfully submit that by the use of the word "beer" in the statute, Congress used it in the ordinary and accepted meaning of the word. That it covers the beverage that was sold and possessed by the appellant in this case, that the court arrived at the only result possible in convicting the defendant, that the judgment of the trial court appealed from is right and should be affirmed.

Respectfully submitted,

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